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## Labor Law

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# LABOR LAW

## EMPLOYEE INTERROGATIONS: ALL-THE-CIRCUMSTANCES TEST IS NINTH CIRCUIT STANDARD

*"Most [labor] rules have undergone a continuous process of refinement and change, and some have enjoyed a particularly checkered career, being born in one period, laid to rest in another, only to be resurrected, like the Phoenix, garbed in a slightly different plumage."*<sup>1</sup>

### I. INTRODUCTION

In *Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB*,<sup>2</sup> the Ninth Circuit upheld a decision of the National Labor Relations Board (Board) to readopt an all-the-circumstances standard for determining whether an employer who questions employees about union activities commits an unfair labor practice. In affirming the Board's decision to abandon its per se test of employee interrogations, the court noted that employer questioning is not necessarily coercive and that an all-the-circumstances standard allows the Board and administrative law judges to determine, on a case-by-case basis, whether all the facts demonstrate coercive employer behavior.<sup>3</sup>

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1. D. Bok, *Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 39 (1964).

2. 760 F.2d 1006 (9th Cir. 1985) (per Solomon, D.J., United States Senior District Judge for the District of Oregon, sitting by designation; other panel members were Alarcon, J., and Kennedy, J., concurring).

3. 760 F.2d at 1009. In its rejection of the per se rule, the Board also overruled the following cases: PPG Industries Inc., 251 N.L.R.B. 1146 (1980); Anaconda Co., 241 N.L.R.B. 1091 (1979); Paceco, A Div. of Fruehauf, 237 N.L.R.B. 399 (1978); ITT Automotive Electrical Products Division, 231 N.L.R.B. 878 (1977). See *Rossmore House*, 269 N.L.R.B. 1176 (1984).

## II. FACTS

In the summer of 1982, Warren Harvey was employed as a cook and waiter for Rossmore House, a residential retirement hotel owned by Shyr-Jim Tsay and managed by Ronald Tvenstrup. Harvey became interested in establishing a union at the retirement home and contacted representatives of the Hotel Employees and Restaurant Employees Union to arrange for an employee meeting at his house.<sup>4</sup>

Following the meeting, the union sent a mailgram to Rossmore House notifying them that Harvey and another employee had formed a union organizing committee and that their activities were protected under the National Labor Relations Act.<sup>5</sup> The content of a conversation between Tvenstrup and Harvey after Tvenstrup received the mailgram was disputed.<sup>6</sup>

Tvenstrup testified that he approached Harvey with the mailgram in hand and asked, "Is this true?" to which Harvey replied affirmatively. Tvenstrup then said, "Okay, thank you" and proceeded to walk away, at which time Harvey stated, "I am sorry; it is nothing personal."<sup>7</sup>

Harvey's version was that Tvenstrup walked into the kitchen waving the mailgram asking, "What is this about a union?" to which Harvey responded, "That's right about the union. We're going to have a union because of the lack of benefits, lack of insurance, lack of job security, vacations without pay . . . ." Harvey further testified that Tvenstrup then stated that the owners "were not going to like it and that they would fight it, have to fight it to the hilt" and that as a manager Tvenstrup would have to fight it, too.<sup>8</sup>

A second conversation occurred on August 7, 1982. According to Harvey's testimony, the owners approached him as he was

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4. Rossmore House, 269 N.L.R.B. 1176 (1984).

5. See *infra* notes 13 and 14 and accompanying text.

6. 269 N.L.R.B. 1176. The ALJ stated that he was unable to conclude whose version of the conversation was more accurate, but determined that "under either witness' testimony his conclusion would be the same." *Id.* at 1176 n.4.

7. *Id.* at 1176.

8. *Id.*

leaving work. Tsay said, "The manager tells me you're trying to get a union in here," and asked why. Harvey replied that low pay, lack of benefits, and lack of job security were responsible. Tsay then asked if the union charged a fee to join. When Harvey said yes, Tsay said he would talk to the manager about it.<sup>9</sup>

The Administrative Law Judge (ALJ) found the interrogations under either party's version of the facts to be violative of section 8(a)(1) of the National Labor Relations Act.<sup>10</sup> The Board disagreed, and in reversing the decision, overruled existing Board law supporting the ALJ's conclusions.<sup>11</sup>

### III. BACKGROUND

#### A. UNFAIR LABOR PRACTICES: THE ACT, THE BOARD, AND THE COURTS

The National Labor Relations Act,<sup>12</sup> popularly known as the Wagner Act, was passed by Congress in 1935. It was amended twelve years later when Congress, aspiring to balance the rights of employees and management, enacted the Labor Management Relations Act, 1947.<sup>13</sup>

Prior to the 1947 amendments, which are frequently cited as the Taft-Hartley amendments after their legislative sponsors, the Act proscribed unfair labor practices committed only by employers.<sup>14</sup> The amended Act, however, prohibits both employers and labor organizations from engaging in unfair labor

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9. *Id.* Harvey's employment was terminated by Tvenstrup, but for reasons other than his union activities. 760 F.2d at 1007.

10. *Id.* Section 8(a)(1), codified at 29 U.S.C. § 158(a)(1), states that "[i]t shall be an unfair labor practice for an employer to (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1982).

Section 7, codified at 29 U.S.C. § 157, states in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1982).

11. 269 N.L.R.B. at 1176. *See supra* note 3.

12. National Labor Relations Act, Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

13. Labor-Management Relations Act, Ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 151-169 (1982)).

14. *See* National Labor Relations Act, Ch. 372, 49 Stat. 449, 452 (1935).

practices.<sup>15</sup>

The agency responsible for processing unfair labor practice cases is the National Labor Relations Board. That agency is empowered "to prevent any person from engaging in any unfair labor practice . . . affecting commerce."<sup>16</sup> The principal components of the Board are the five Board members and the General Counsel, each appointed by the President with the advice and consent of the Senate.<sup>17</sup>

The role of courts in reviewing decisions of the Board is a limited one.<sup>18</sup> The courts of appeal are confined to determinations of whether decisions are supported by substantial evidence on the record considered as a whole.<sup>19</sup>

15. See 29 U.S.C. § 157(a), (b) (1982).

16. 29 U.S.C. § 160(a) (1982). Although the Board is charged with disposing of cases once an action is filed, it is the responsibility of an employer, an employee, or a union to set the process in motion. That is done when one of the involved parties makes a determination that an unfair labor practice has occurred and files a charge with the office of the General Counsel. See 29 U.S.C. § 160(b) (1982).

17. The General Counsel is responsible for investigating and processing unfair labor practice claims. Directors of regional offices of the General Counsel determine whether an unfair labor practice charge that has been filed has merit, and if so, issues a complaint charging that the Act has been violated. See 29 U.S.C. § 153(d) (1982).

After a complaint has been issued, there is a hearing before an Administrative Law Judge (ALJ). At the hearing, the General Counsel has the burden of proving that a violation of the Act has occurred. At the conclusion of the hearing, the ALJ makes a recommended report and order for the Board, which is not binding unless approved by the Board. If desired, either the charging party, the General Counsel, or the respondent has the right to appeal the ALJ's report to the Board. See 29 U.S.C. § 160 (1982).

A decision by the Board may be appealed to a U.S. Court of Appeals in the district where an alleged unfair labor practice occurred, where the appealing party resides or transacts business, or in the U.S. Court of Appeals for the District of Columbia. *Id.* If a respondent refuses to abide by the Board's decision, the general counsel may petition an appropriate court of appeals to enforce it. *Id.*

18. See, e.g., *NLRB v. Bon Hennings Logging Co.*, 308 F.2d 548 (9th Cir. 1978). The Ninth Circuit held that the Board's factual finding must be accepted if it is supported by substantial evidence. *Id.* at 553.

19. See *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). The Supreme Court in *Weingarten* stated that "the Board has the special function of applying provisions of the Act to the complexities of industrial life . . . and its special competence in the field is justification for the deference accorded its determination." *Id.* at 266. See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1950). In that decision the Supreme Court held that the Board's finding must be accepted if supported by substantial evidence on the record considered as a whole. *Id.* at 493.

## B. SECTION 8(a)(1) AND EMPLOYEE INTERROGATIONS

The first of the five employer unfair labor practices prohibited under the Act is set forth in section 8(a)(1).<sup>20</sup> That section requires that employers refrain from interfering with, restraining, or coercing employees in the exercise of their collective bargaining rights.<sup>21</sup> Since the passage of the Wagner Act, labor organizations have argued that employee interrogations automatically violate section 8(a)(1) because of their tendency to interfere with, restrain, or coerce employees.<sup>22</sup> In *Standard-Coosa-Thatcher*,<sup>23</sup> the Board described employee interrogations as occurring “[w]hensoever an employer directly or indirectly attempts to secure information concerning the manner in which or the extent to which his employees have chosen to engage in union organization or other concerted activity.”<sup>24</sup>

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20. See *supra* note 10.

21. The remaining employer unfair labor practices prohibit employers from dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it (29 U.S.C. § 158(a)(2)); discriminating against employees in order to encourage or discourage membership in any labor organization (*id.* § 158(a)(3)); discharging employees because of their having filed charges or given testimony under the Act (*id.* § 158(a)(4)); or refusing to bargain collectively (*id.* § 158(a)(5)).

22. See *Standard-Coosa-Thatcher*, 85 N.L.R.B. 1358 (1949). In that decision the Board noted:

[C]ases in which interrogated employees have been discharged or otherwise discriminated against on the basis of information obtained through interrogation are numerous. These cases demonstrate conclusively that, by and large, employers who engage in this practice are not motivated by idle curiosity, but rather by a desire to rid themselves of union adherents.

*Id.* at 1362.

23. 85 N.L.R.B. 1358 (1949).

24. *Id.* at 1360. More recently, an associate secretary of the Board noted that employers might be inclined to interrogate their employees for the following reasons:

When an employer learns that an organizational campaign is going on among his employees, human nature being what it is, he's just bursting with curiosity to know whether any of his employees have joined, if there have been union meetings, who has attended them, and what was said. How better can he find out than to ask his employees? There would be no problem for the employer or the Board if it could be established that such interrogation was purely motivated. Unfortunately for this point of view, experience has shown that in many cases such questioning is followed by reprisals against union adherents.

H. KLEEB, *TAFT-HARTLEY RULES DURING UNION ORGANIZING CAMPAIGNS*, 55 L.R.R.M. (BNA) 114, 115 (1964).

Throughout the administration of the Wagner Act and early years of the Taft-Hartley amendments, the Board's policy was that employer interrogations of employees about any aspect of union activities or attitudes was a per se violation of section 8(a)(1) of the Act.<sup>25</sup> The Board's general belief was that such questioning, even standing alone, had restraining or coercive tendencies and was therefore unlawful.<sup>26</sup> During this period, general defenses to cases coming before the Board that a question was isolated,<sup>27</sup> prompted by idle curiosity,<sup>28</sup> or by innocent or benign motives<sup>29</sup> were rejected.

The Board's application of its per se doctrine was, however, not without inconsistencies. Often the Board examined the surrounding circumstances or the context in which an interrogation took place before concluding there had been a per se violation.<sup>30</sup>

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25. See *Standard-Coosa-Thatcher*, 85 N.L.R.B. 1358 (1949), where the Board concluded as follows:

In prohibiting interrogation . . . we are not only preserving the employees' right to privacy in their union affairs; we are not only removing a subtle but effective psychological restraint on employees' concerted activities; but we are also seeking to prevent the commission of the further unfair labor practice of discrimination by condemning one of the first steps leading to such discrimination.

*Id.* at 1362. Note that in *Standard-Coosa-Thatcher*, the novel defense that since employees wore pro-union buttons they were openly professing their pro-union sympathies and thus could be properly interrogated in union matters was rejected by the Board.

26. See, e.g., *I.B.S. Mfg. Co.*, 96 N.L.R.B. 1263 (1951). In *I.B.S.* even though the Trial Examiner found a supervisor's interrogation of an employee concerning the latter's union membership "isolated," the Board held that the interrogation was not isolated in view of other unfair labor practices the employer had committed. *Id.* at 1265.

27. See, e.g., *Pecheur Lozenge Co., Inc.*, 98 N.L.R.B. 496 (1952). The Board in *Pecheur* held that interrogation of employees concerning their union membership, even if standing in isolation, is a per se violation of section 8(a)(1) of the Act. *Id.* at 499.

28. See, e.g., *F.C. Russell Co.*, 92 N.L.R.B. 206 (1950). In that decision the Board rejected the Trial Examiner's conclusion that the interview and interrogations of the employees "was an endeavor to fraternize with the employees and to best place them in the organization of Respondent . . . when he entered into any conversation with an employee it was more along the lines of friendship rather than acquiring knowledge to be used for an ulterior motive." *Id.* at 209. The Board was not concerned with motives in concluding that respondent's interrogations violated section 8(a)(1). *Id.*

29. See, e.g., *Dinion Coil Co.*, 96 N.L.R.B. 1435 (1951). In *Dinion*, respondent claimed unsuccessfully that during periods of union organization "any plant manager who did not have general information as to what was going on would be both stupid and inefficient." *Id.* at 1437 n.5.

30. See, e.g., *Wilson and Co.*, 95 N.L.R.B. 882 (1951). The Board declined to find a violation of section 8(a)(1) in preelection questioning of 3 out of 1,200 employees regarding their union sympathies, agreeing with the Trial Examiner that the questioning did not "form a pattern of conduct so clearly defined as to warrant a conclusion of violation

The Board occasionally found interrogation to be permissible when questioning was determined to be too isolated or casual to warrant per se treatment, or when some overriding necessity justified the questions.<sup>31</sup>

The Board's basic stance that interrogation by an employer prevented employees from freely exercising their right to engage in concerted activities was, in most instances, enforced by the courts of appeals.<sup>32</sup> Judicial support by the courts of the Board's per se policy continued until the late 1940s.

Following the enactment of the Taft-Hartley amendments,<sup>33</sup> which ameliorated the rights of employers under the Act, courts increasingly became reluctant to follow the Board's per se approach. In the majority of circuits, courts started to examine the circumstances surrounding employee questioning to determine whether an employer's conduct reasonably tended to restrain or

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of the Act." *Id.* at 887. *See also* *New Mexico Transportation Co.*, 107 N.L.R.B. 47 (1953). There the Board concluded that "[w]e are not convinced that, under the facts and circumstances of this case, such an isolated act interferes with . . . Section 8(a)(1) of the Act." *Id.* at 49. In that decision, respondent had asked an employee whether he had been invited to join the union and other questions such as "Do you think the Union can do more for you than I could?" *Id.*

31. Note that interrogation was expressly allowed by the Board where an inquiry into union membership was necessary to the defense of unfair labor practice charges and it was strictly limited to the issues raised in the complaint. *See Joy Silk Mills*, 85 N.L.R.B. 1263 (1949). *See also Surprenant Mfg. Co. v. NLRB*, 341 F.2d 756, 763 (6th Cir. 1965) (questions seeking to elicit information an employee gave to a Board agent constituted "[a]n indiscriminate inquiry which exceeded the necessities of the situation"); *Stafford Operating Co.*, 96 N.L.R.B. 1217, 1221 (1951) (no violation when an employer asked an employee union spokesman whether he was about to get "the union matter straightened out"); *Keeskin Poultry*, 97 N.L.R.B. 467, 472 (1951) (no violation was found when an employer asked what employees expected to have left out of their pay after government and the union each got their cut); *U.S. Gypsum Co.*, 93 N.L.R.B. 966, 968 (1951) (no violation found where an employer asked employees why they were wearing union buttons, because that was "an understandable impulsive reaction which did not intend to interfere with . . . employees within the meaning of . . . the Act").

32. In its annual report for the year 1952, the Board noted as follows:

In the great majority of the numerous cases involving questioning of employees regarding their union sympathies or membership, their participation in organizational activities, or their voting intentions in a pending Board election, the courts continued to sustain the Board's conclusion that such interrogation in the circumstances invaded the rights of employees guaranteed in section 7 of the act, and thus violated section 8(a)(1) of the act.

17 NLRB ANN. REP. 224 (1952).

33. *See* 29 U.S.C. §§ 151-169 (1982).



coerce employees.<sup>34</sup>

A few years later, and in response to courts' unfavorable treatment of the per se rule,<sup>35</sup> the Board itself rejected its per se policy. In the *Blue Flash Express*<sup>36</sup> decision, the Board established that "the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of rights guaranteed by the Act."<sup>37</sup> The Board also stated that it agreed with and adopted the test laid down by the Second Circuit Court of Appeals in *NLRB v. Syracuse Color Press*,<sup>38</sup> which the Board construed to be that "the answer to whether particular interrogation interferes with, restrains, and coerces employees must be found in the record as a whole."<sup>39</sup>

*Blue Flash* involved an employer who wished to know how many employees had signed union authorization cards so that he would know how to respond to the union's claim of majority status. The employer systematically polled each employee individu-

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34. See, e.g., *NLRB v. Syracuse Color Press, Inc.*, 209 F.2d 596 (2nd Cir. 1954). The court stated that "since the Taft-Hartley Act became effective, interrogation of employees by an employer . . . which fall short of present threat or intimidation, or promise of favor or benefit as a reward for resistance to the union, are not unlawful." *Id.* at 601.

35. The following cases are representative of decisions in their respective circuits, each finding that interrogation is not per se unlawful. See *NLRB v. England Bros.*, 201 F.2d 395 (1st Cir. 1953); *NLRB v. Associated Dry Goods Corp.*, 209 F.2d 593 (2nd Cir. 1954); *NLRB v. Clearwater Finishing Co.*, 203 F.2d 938 (4th Cir. 1953); *Jacksonville Paper Co. v. NLRB*, 137 F.2d 148 (5th Cir. 1943); *NLRB v. Superior Co.*, 199 F.2d 39 (6th Cir. 1952); *NLRB v. Arthur Winer, Inc.*, 194 F.2d 370 (7th Cir. 1952), *cert. denied*, 344 U.S. 819; *NLRB v. Protein Blenders*, 215 F.2d 749 (8th Cir. 1954); *Wayside Press, Inc. v. NLRB*, 206 F.2d 862 (9th Cir. 1953); *NLRB v. McCatron*, 216 F.2d 212 (9th Cir. 1954); *Atlas Life Ins. Co. v. NLRB*, 195 F.2d 136 (10th Cir. 1952). *Cf.* *NLRB v. Jackson Press, Inc.*, 201 F.2d 541 (7th Cir. 1953) and *NLRB v. West Coast Casket Co.*, 205 F.2d 902 (9th Cir. 1953), which indicated movement towards the per se rationale. *But see* *Bochner v. NLRB*, 180 F.2d 1021 (3rd Cir. 1950) and *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), where the per se rationale was upheld.

36. 109 N.L.R.B. 591 (1954).

37. *Id.* at 593. The Board also stated that "[w]e hereby repudiate the notion that interrogation per se is unlawful and overrule *Standard-Coosa-Thatcher* and the line of cases following it to the extent they are inconsistent with our decision today," and noted that the courts of at least six circuits had explicitly or at least by necessary implication condemned the per se rationale. *Id.*

38. 209 F.2d 596 (2nd Cir. 1953), *cert. denied*, 347 U.S. 966. In *Syracuse*, although the Board's per se rule was rejected, the court found employee interrogations unlawful because circumstances indicated questions had coercive effects. *Id.*

39. 109 N.L.R.B. at 594. The Board did, however, distinguish the facts of the two cases. See *infra* text accompanying note 40.

ally in his office, stating first that it did not matter to him whether the employees were union members. In response to the union's objection, the Board noted that (1) the employer communicated his purpose for the interrogations to the employees and the purpose was legitimate, (2) the employer assured them of no reprisals, and (3) the interrogation occurred in an overall background free of union hostility.<sup>40</sup> The Board emphasized, however, that all the circumstances must be evaluated in making a determination of whether an employee interrogation restrains or interferes with employees in the exercise of their rights under the Act.<sup>41</sup>

After the *Blue Flash* decision, consistency emerged in Board and court opinions concerning employee interrogations.<sup>42</sup> For the first time since the passage of the Wagner Act, both agreed that a consideration of the totality of the circumstances was necessary in assessing allegations of unlawful interrogation. In subsequent years, the Board and some circuits developed standards to be used in identifying the circumstances in which interrogation would be found unlawful.<sup>43</sup> Where courts estab-

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40. 109 N.L.R.B. at 593, 594. The *Blue Flash* majority also addressed the issue of casual or isolated "interrogations," voicing its objection that a *per se* analysis "would mean that a casual, friendly, isolated instance of interrogation by a minor supervisor would subject the employer to a finding that he had committed an unfair labor practice and result in the issuance of a cease and desist order. . . ." *Id.* at 595. The majority went on to state that if such a cease and desist order were enforced by the court, it "would subject the employer to punishment for contempt of court if the same or another minor supervisor repeated the question to the same or another employee." *Id.*

41. *Id.* at 594.

42. See, e.g., *NLRB v. Roberts Brothers*, 225 F.2d 58 (9th Cir. 1955). In *Roberts*, the court made the following general statement on changes justifying the Board's new position:

Some twenty years ago when the war over the unionization of industry was at the critical stage, employees might well and with good reason have feared to reveal their union sentiment and might well have been swayed one way or another by an employer's statement as to his position on the subject. Now, labor and industry speak with equal dignity and it requires something more than mere suspicion to read coercion into an employer's speech which, upon its face, is in all respects within the proprieties. We think it is no longer proper to assume that the American employee is a craven individual afraid to stand up and express himself freely on the subject of his own welfare.

*Id.* at 60.

43. See, e.g., *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964). There the court examined (1) an employer's background to determine whether the employer had a history

lished such standards they generally did so to facilitate their application of the all-the-circumstances evaluation, not to create new tests to replace the all-the-circumstances rule.<sup>44</sup>

In 1967 the Board developed a more restrictive test to be used when an employer systematically polled employees. In *Struksnes Construction Co.*,<sup>45</sup> the Board determined that in polling cases an employer violates section 8(a)(1) of Taft-Hartley unless (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) the purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) an employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.<sup>46</sup> The *Struksnes* polling rule has subsequently been adopted by most courts of appeals.<sup>47</sup>

In further support for their rejection of the per se rule and adoption of an all-the-circumstances test, courts determined that "innocuous" questions were permissible under section 8(c) of the Act.<sup>48</sup> That section states that the expressing of any views, argument, or opinion shall not constitute or be evidence of an unfair labor practice if such expression contains no threat of reprisal or promise of benefit.<sup>49</sup> In *NLRB v. Huntsville*,<sup>50</sup> the

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of hostility and discrimination, (2) the nature of the information sought, (3) the identity of the questioner, (4) the place and method of interrogation, and (5) the truthfulness of the reply. *Id.* at 48. The Ninth Circuit, in its application of the factors outlined in the *Bourne* decision, has noted that they are "helpful guidelines for dealing with the question of whether an impermissible 'interrogation' has taken place." *NLRB v. Hotel Conquistador, Inc.*, 398 F.2d 430, 434 (9th Cir. 1968).

44. *See, e.g.*, *NLRB v. Rubin*, 424 F.2d 748 (2nd Cir. 1970). In that decision, the court stated that "[w]e believe that under all the circumstances, the *Bourne* standards were met." *Id.* at 751. *See infra* note 46.

45. 165 N.L.R.B. 1062 (1967). From the time of the *Blue Flash* decision until 1967, the Board used the same set of rules, the all-the-circumstances test, to evaluate the polling of many employees as it did to examine the interrogation of a single employee. *See, e.g.*, *NLRB v. Roberts Brothers*, 225 F.2d 58, 60 (9th Cir. 1955); *NLRB v. Protein Blenders, Inc.*, 215 F.2d 749, 750 (8th Cir. 1954). *But c.f.* *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967) (separate set of rules to evaluate the special problems surrounding polling cases).

46. 165 N.L.R.B. at 1063.

47. *See, e.g.*, *NLRB v. Super Toys, Inc.*, 458 F.2d 180 (9th Cir. 1972), a polling case in which the court stated that the "Board upheld the examiner's conclusion that respondent did not comply with the requirements of *Struksnes*. We do too." *Id.* at 183.

48. *See, e.g.*, *NLRB v. Huntsville Mfg. Co.*, 514 F.2d 723, 725 (5th Cir. 1975).

49. *See* 29 U.S.C. § 158(c) (1982).

50. 514 F.2d 723 (5th Cir. 1975).

Fifth Circuit stated that “[w]e think that in the enforcement of the Act care should be taken not to render nugatory or meaningless the right of management to converse with employees.”<sup>51</sup> And in a more recent decision the Third Circuit, in *Graham Architectural Products v. NLRB*,<sup>52</sup> determined that “[i]f Section 8(a)(1) of the Act deprived . . . employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution.”<sup>53</sup>

Both the Board and the courts followed the all-the-circumstances standard until the late seventies when, without overruling *Blue Flash* or discussing why it declined to apply the *Blue Flash* test, the Board decided to restore the per se rule. In *Paceco*,<sup>54</sup> the Board held that interrogation of any employee’s union sympathies or his reasons for supporting a union reasonably tends to interfere with the free exercise of employee rights under the Act and consequently is coercive.<sup>55</sup> The decision the Board cited as justification for its conclusion was *American Freightways Co.*,<sup>56</sup> which relied on pre-*Blue Flash* standards when it enunciated that “[t]he test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the act.”<sup>57</sup>

Further demonstrating a retreat from the *Blue Flash* all-the-circumstances analysis the Board in *PPG Industries*<sup>58</sup> held that employers could not lawfully question employees about their union activities even when the employees were open and known union supporters and the employer made no express threats or promises.<sup>59</sup> The *PPG* Board expressly overruled other cases to the extent that the cases held that open union sympathizers may lawfully be questioned about their union views if

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51. *Id.* at 725.

52. 697 F.2d 534 (3rd Cir. 1983).

53. *Id.* at 541. Note that it would also collide with the protection of employer’s speech contained in the Act. See *supra* text accompanying notes 48 and 49.

54. 237 N.L.R.B. 399 (1978), *vacated and remanded in part*, 601 F.2d 180 (5th Cir. 1979), *supp. dec.*, 247 N.L.R.B. 1405 (1980).

55. 237 N.L.R.B. at 399-400.

56. 124 N.L.R.B. 146 (1959).

57. *Id.* at 147 (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

58. 251 N.L.R.B. 1146 (1980).

59. *Id.* at 1147.

they are not threatened or given promises.<sup>60</sup>

This sudden change in Board policy did not elicit much support in the courts. Cases were remanded to the Board for failure to consider circumstances relevant to alleged interrogation violations,<sup>61</sup> and the courts of appeals continued to rely on an all-the-circumstances standard for reviewing employee interrogations.<sup>62</sup>

The courts that had set particular standards to assist them in an all-the-circumstances evaluation also continued to apply those standards.<sup>63</sup> Three Ninth Circuit decisions, *J.M. Tanaka Construction, Inc. v. NLRB*,<sup>64</sup> *NLRB v. Fort Vancouver Plywood Co.*,<sup>65</sup> and *Super Toys, Inc. v. NLRB*,<sup>66</sup> held that unless assurances against reprisal were given to questioned employees, questioning was coercive and thus violated the Act. Notably, however, in *Tanaka* and *Fort Vancouver*, the court relied on the requirements set forth in *Super Toys*, which was a polling case citing *Struksnes* with approval.<sup>67</sup> As previously discussed, the

60. *Id.*

61. See, e.g., *Paceco v. NLRB*, 601 F.2d 180 (5th Cir. 1979). In *Paceco*, the court criticized the Board for not setting forth the legal standards by which it determined that an interrogation was coercive. *Id.* at 182, 183. See also *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, 541 (3rd Cir. 1983) (Board criticized for ignoring circumstances relevant to alleged interrogation violations).

62. For cases in the Ninth Circuit, see *NLRB v. Brooks Camera*, 691 F.2d 912, 919 (9th Cir. 1982); *Lippincott Industries v. NLRB*, 661 F.2d 112, 114 (9th Cir. 1981); *NLRB v. Los Angeles New Hosp.*, 640 F.2d 1017, 1019 (9th Cir. 1981); *Silver Spur Casino*, 623 F.2d 571, 584 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977). For cases in other circuits, see *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534 (3rd Cir. 1983); *Lord and Taylor v. NLRB*, 703 F.2d 163 (5th Cir. 1983); *NLRB v. Ajax Tool Works, Inc.* 713 F.2d 1307 (7th Cir. 1983).

63. See, e.g., *Delco-Remy Div., General Motors Corp. v. NLRB*, 596 F.2d 1295 (5th Cir. 1979). The Fifth Circuit found the following:

Although an express statement of purpose as well as an express assurance of no reprisal may be desirable, [citation omitted] such warning is not required when it is apparent from the circumstances, such as are present here, that the interrogation is for an innocent purpose and that the questions do not otherwise convey a veiled threat of reprisal.

*Id.* at 1311.

64. 675 F.2d 1029 (9th Cir. 1982).

65. 604 F.2d 596 (9th Cir. 1979), *cert. denied*, 455 U.S. 915 (1980).

66. 458 F.2d 180 (9th Cir. 1972).

67. *Id.* at 182, 183 (citing with approval *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967)).

*Struksnes* criteria, which require that an employer give interrogated employees assurances against reprisals, were not established for application to interrogation cases involving isolated questioning of employees.<sup>68</sup> The *Struksnes* requirements were fashioned to address the special problems of systematic employer polls.<sup>69</sup>

### C. THE *ROSSMORE HOUSE* DECISION

In 1984, possibly in an attempt to put an end to its conflicting decisions and renewed disharmony with the courts, the Board returned to an all-the-circumstances standard for evaluating employee interrogations. In *Rossmore House*,<sup>70</sup> the Board concluded that *PPG Industries*

improperly established a per se rule that completely disregarded the circumstances surrounding an alleged interrogation and ignored the reality of the workplace. Such a per se approach had been rejected by the Board 30 years ago when it set forth the basic test for evaluating whether interrogations violate the Act: whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.<sup>71</sup>

The Board expressly overruled *PPG* and similar cases finding that an employer's questioning of open union supporters about their union sentiments, in the absence of threats or promises,

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68. See *supra* notes 45-47 and accompanying text.

69. See, e.g., *R.M.E., Inc.*, 171 N.L.R.B. 213 (1968). In that decision the Board stated as follows:

In view of the fact that Respondent did not systematically poll its employees as to how they expected to vote in the election, we find it unnecessary to pass upon the Trial Examiner's reliance on *Struksnes Construction Co., Inc.*, 165 N.L.R.B. 1062, in finding that the interrogation of employees was coercive.

*Id.* at 213 n.1. See also *NLRB v. Lorben, Corporation*, 345 F.2d 346 (2nd Cir. 1965). In *Lorben*, the Second Circuit noted that "[s]trict rules may not suit the casual question privately put to a few employees. But when the employer sets in motion a formal tabulation of this sort, it is not too much to ask that he provide some explanation and assure his employees against reprisal." *Id.* at 350.

70. 269 N.L.R.B. 1176 (1984).

71. *Id.* at 1177 (citing *PPG Industries*, 251 N.L.R.B. 1146 (1980)). See *supra* notes 58-60.

necessarily interferes with, restrains, or coerces employees in violation of section 8(a)(1) of the Act.<sup>72</sup>

The Board also noted that before *PPG*, it had declined to find violations in cases involving similar circumstances,<sup>73</sup> and declared that its view was consonant with that expressed by the Seventh Circuit in *Midwest Stock Exchange v. NLRB* and with the Third Circuit in *Graham Architectural Products v. NLRB*.<sup>74</sup>

In reaching its conclusion that no violation of section 8(a)(1) of the Act had occurred, the Board considered that Warren Harvey was an active union supporter who openly declared his union ties, and that under the totality of the circumstances, the respondent's questions of Harvey were noncoercive. The Board dismissed the union's complaint in its entirety.<sup>75</sup>

#### IV. THE COURT'S DECISION

In a succinct discussion, the Ninth Circuit acknowledged

72. *Id.* at 1177, 1178.

73. The Board cited *B.F. Goodrich Footwear Co.*, 201 N.L.R.B. 353 (1973), where no violation had been found when a supervisor asked two employees who were open union partisans how they felt about the union. *Rossmore House*, 269 N.L.R.B. at 1177.

74. *Id.* at 1177 (citing *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980) and *Graham Architectural Products v. NLRB*, 697 F.2d 534 (3rd Cir. 1983)). In *Midwest*, the court concluded as follows:

It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.

635 F.2d 1255 at 1267.

In *Graham* the court stated the following:

Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace.

697 F.2d 534 at 541.

75. *Rossmore House*, 269 N.L.R.B. at 1178. Note that the dissent rejected the majority's claim that *PPG* established a per se rule, and felt that on the contrary, the majority established a per se rule stating that absent an accompanying threat of reprisal or promise of benefit, the interrogation of an open union adherent will not violate the Act. *Id.* (Zimmerman, J., dissenting).

that the Board's decision conflicted with some cases in which the Ninth Circuit held that employee interrogations are unlawful absent express assurances against reprisal.<sup>76</sup> The panel noted, however, that even in *J.M. Tanaka Construction, Inc. v. NLRB*,<sup>77</sup> where a per se standard was espoused, the surrounding circumstances were examined before a coercive interrogation was found.<sup>78</sup> Also noted by the court was the large body of Ninth Circuit law upholding the all-the-circumstances test.<sup>79</sup>

In concluding that the Board acted within its province in returning to the all-the-circumstances test, the panel acknowledged that an employer's questioning of an employee's union views is not necessarily coercive and may arise during casual conversation. The court noted that "[e]mployers often mingle with their employees, and union activities are a natural topic of conversation."<sup>80</sup>

The court also determined that a standard that considers the totality of the circumstances was a "realistic approach to the enforcement of section 8(a)(1)."<sup>81</sup> The panel felt that such a standard is consistent with the Act because it allows the trier of fact to determine whether all the facts demonstrate coercive behavior.

The court concluded that the Board correctly applied the all-the-circumstances test to the facts of the case, and that under either Tvenstrup's or Harvey's version of their conversation, Tvenstrup's inquiry was not coercive. Supporting this conclusion, the court noted that Harvey openly declared his activities with the union and, under the circumstances, Tvenstrup's and Tsay's questioning was not unlawful.<sup>82</sup>

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76. 760 F.2d at 1008 (citing *J.M. Tanaka Construction, Inc. v. NLRB*, 675 F.2d 1029 (9th Cir. 1982); *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980), and *Super Toys Inc. v. NLRB*, 458 F.2d 180 (9th Cir. 1972)). *But see supra* text accompanying notes 67-69.

77. 675 F.2d 1029 (9th Cir. 1982).

78. 760 F.2d at 1008, 1009.

79. *Id.* at 1009 (citing *NLRB v. Brooks Camera*, 691 F.2d 912, 919 (9th Cir. 1982); *Lippincott Industries v. NLRB*, 661 F.2d 112, 114 (9th Cir. 1981); *NLRB v. Silver Spur Casino*, 623 F.2d 571, 584 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); and *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977)).

80. 760 F.2d at 1009.

81. *Id.*

82. *Id.*



The concurring opinion, while supporting the majority's decision, noted that the holding was not consistent with a broad statement in a recent case where the Ninth Circuit held that even when the Board has determined that a new rule is preferable, "it is irrational to discard an effective procedure."<sup>83</sup> The concurring judge felt that confronted with the quoted statement in the context of *Hotel Employees*, the court must either apply the statement and reverse the Board, or announce it was dictum unnecessary to the decision from which it came. The concurring judge felt the latter course was the one that should be adopted, acknowledging however that "it is not a very good way to run the circuit."<sup>84</sup>

## V. ANALYSIS

The harm to employees caused by coercive employer questioning is generally not disputed. Although one study has shown that coercive tactics used by employers during union campaigns has no greater effect on employee behavior than lawful employer activity,<sup>85</sup> few would argue that the practice of employer coercion is permitted under the National Labor Relations Act, or even desirable. Clearly, coercive questioning can impede the collective bargaining process and inhibit employees' rights guaranteed under the Act. Disputes then center on how to define coercive questioning, on whether employer questioning of employees about union activities is justifiable under any circumstances, and on what rules to apply to what situations.

Since the passage of the Wagner Act in 1935, the Board and courts have essentially proposed two different methods of handling employer questioning of employees. The first is the *per se* doctrine. Under this policy, employers may not question employees concerning their union activities. If they do, employers will automatically be found in violation of section 8(a)(1) of the Act. The second is the all-the-circumstances test. Here, the lawfulness of a question is determined based on an examination of

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83. *Id.* (Kennedy, J., concurring) (citing *Financial Inst. Employees of America v. NLRB*, 752 F.2d 356 (9th Cir. 1984)) (employer refused to bargain with union when it had affiliated with another union).

84. 760 F.2d at 1009 (Kennedy, J. concurring).

85. See J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 115-16, 126 (1976).

the circumstances surrounding the situation in which the questioning occurred. With regard to both tests, there have often been modifications to the all-the-circumstances test or exceptions to the per se rule that have been established by some courts and, on occasion, by the Board. These modifications or exceptions have included guidelines created to assist the trier of fact in evaluating an alleged unlawful interrogation.

Obviously, the per se approach is the least complicated to apply, and certainly it is the most judicially expeditious. Once a violation has been shown, the job is done; time is not wasted hearing lengthy explanations of why or under what circumstances the violation occurred. With good reason, however, the per se rule has been rejected by both the Board and the courts, and by the former more than once.

The efficacy of a per se rule is limited by the ability of those who are charged with enforcing it to define properly the offending behavior. The Board in *Standard-Coosa-Thatcher*, which held that employee interrogations are per se violations of the Act, described an employee interrogation as occurring “[w]henever an employer directly or indirectly attempts to secure information concerning the manner in which or the extent to which his employees have chosen to engage in union organization or other concerted activity.”<sup>86</sup> At first glance, the description seems satisfactory, a precise and reasonable means of determining employer misconduct. A closer look, however, reveals that the description does not comport with the language of the statute. Section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees, not from attempting to secure information from them.<sup>87</sup>

When the Board in *Blue Flash Express* overruled *Standard-Coosa-Thatcher*, it did not reformulate a definition of employer interrogation. It did, however, insist on analyzing employer questioning to determine whether, under all the circumstances, it reasonably tended to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by the Act.<sup>88</sup> If the Board had gone one step further and redefined

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86. 85 N.L.R.B. 1358, 1360 (1949). See *supra* text accompanying note 23.

87. See *supra* note 10.

88. See *supra* notes 36-41 and accompanying text.

employee interrogation so as to require that employer behavior interfere with, restrain, or coerce employees, the Board may have been able to continue a per se policy, for then there would be no doubt that all employee interrogations, once established, violate the Act. A determination of whether an employee interrogation occurred might then be made not by inquiring whether an employer questioned employees, but rather by inquiring about the nature, intent, or effect of the questions asked of them. But instead of developing a definition that conformed to requirements of the Act, the Board in *PPG Industries*, like the Board in *Standard-Coosa-Thatcher*, viewed the process of employer questioning of employees on union activities as inherently coercive, reserving the right, however, to carve out exceptions whenever questions seemed too isolated, casual, benign, or otherwise inconsequential to warrant per se treatment.<sup>89</sup>

This is a poor way to handle the problem. In addition to creating so many exceptions to the rule that the rule becomes, as one court has termed it, nugatory,<sup>90</sup> a policy that insists that there can be no legitimate purpose to an employer's questioning employees on union matter simply has no basis under the statute. As the cases have revealed, the Board and courts have wrestled with this conflict by frequently examining surrounding circumstances anyway before making a per se determination.<sup>91</sup> An example is *J.M. Tanaka Construction, Inc. v. NLRB*, where the Ninth Circuit stated that interrogations are "inherently suspect and coercive . . . unless express assurances against reprisals are given."<sup>92</sup> In that decision, however, the court considered the circumstances surrounding the interrogations, including the company's "pattern of hostility toward the union."<sup>93</sup>

There are also practical problems with applying a per se rule. Such a rule fails to consider the employee who initiates a conversation about union activities with a supervisor, and whether such a supervisor would be obliged to keep silent, to walk away, or to change the subject. In addition, an employer

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89. See *supra* notes 58-60 and accompanying text.

90. *NLRB v. Huntsville*, 514 F.2d 723 (5th Cir. 1975). See *supra* text accompanying note 50.

91. See *supra* note 30 and accompanying text.

92. 675 F.2d 1029, 1037 (9th Cir. 1982).

93. *Id.*

frequently receives notification, as in *Hotel Employees*, that employees are commencing union organizing activities. A literally applied per se rule against employee interrogations effectively forbids an employer from verifying the validity of any such notification received. For example, in *Hotel Employees*, under either version of the alleged interrogation occurring on August 1,<sup>94</sup> the questioning seemed to have been no more than an attempt by the employer to verify the mailgram informing the employer of union activity. Applying the per se rule, however, the ALJ found the "interrogation" unlawful under the Act.<sup>95</sup>

Finally, if the per se rule deprives employers of the right to ask non-coercive questions of their employees during a union organizing campaign, the rule imposes a chilling effect on speech, prohibited by both the first amendment<sup>96</sup> and section 8(c) of the Act.<sup>97</sup> It is thus essential that union related conversations between employers and employees be specifically found coercive before they are prohibited, rather than categorized as coercive until proven otherwise. As already noted, the per se rule does not provide that such a finding will be made before an interrogation is called coercive, despite assurances offered by the dissent in *Blue Flash* that "[t]here are, of course, instances of interrogation which can be properly regarded as isolated, casual, and too inconsequential in their impact to constitute a violation of the Act or to warrant a Board remedy."<sup>98</sup> As the cases have shown, the Board has often rejected, without examining the surrounding circumstances, employers' defenses that allegedly offending interrogations were isolated or casual.<sup>99</sup>

In view of its inadequacies, it is not difficult to support the Ninth Circuit in its rejection of the per se analysis in favor an all-the-circumstances test. Although the new rule replaces a supposed "bright line" standard with a test that demands a case-by-case analysis of whether behavior may be properly considered unlawful, any additional effort spent on such an analysis is clearly preferable to perpetuating a rule that condemns activity

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94. See *supra* text accompanying note 7.

95. See *Rossmore House*, 269 N.L.R.B. 1176, 1176 n.4 (1984).

96. U.S. CONST. amend. I.

97. See *supra* text accompanying note 49.

98. 109 N.L.R.B. 593 at 597.

99. See *supra* notes 27-29 and accompanying text.

that may not genuinely interfere with employees' rights.

## VI. CONCLUSION

In one sense, there is little practical distinction between the all-the-circumstances test and the per se rule. A practitioner must, in counseling an employer on behavior during an organizational campaign, advise a client to avoid altogether questioning employees about their union activities, much as though a per se rule were still in effect. This is not because, as the per se policy proclaims, all employer questioning is inherently coercive. It is because employers can, and without necessarily realizing it, easily overstep the bounds of noncoercive behavior and use their natural advantage to interfere with employees' organizational activities.

In another sense, the new rule differs greatly from the per se test. Unlike the per se doctrine, it forces those alleging unfair labor practices to prove that an infraction has occurred and honors the fact that the Act forbids coercive employer questions, not all employer questions.

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# LABOR LAW

## *NLRB v. BEST PRODUCTS CO.: IS THE NINTH CIRCUIT BURNING DOWN THE BARN TO GET RID OF THE RATS?*

### I. INTRODUCTION

In *NLRB v. Best Products Co.*<sup>1</sup> the Ninth Circuit enforced a National Labor Relations Board (Board) order requiring Best Products to bargain with the United Food and Commercial Workers Local 428.<sup>2</sup> The court ruled that a representation election would not be set aside based on an imbalance in the number of employer and union observers because the employer was given the opportunity to provide an additional observer but declined to do so.<sup>3</sup> The court also adopted a rule that campaign misrepresentations which fell short of the use of forged documents did not warrant setting aside an election.<sup>4</sup> Voters were able to recognize these misrepresentations as propaganda and were not misled by them.<sup>5</sup>

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1. 765 F.2d 903 (9th Cir. 1985) (per Wiggins, J.; the other panel members were Hall, J. and Smith, D.J., United States District Judge for the District of Montana, sitting by designation).

2. *Id.* at 905.

3. *Id.* at 908.

4. *Id.* at 913 (citing *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 131 (1982)). In *Midland*, campaign literature distributed by the employer to its employees on the day before the election was found by the NLRB to contain material misrepresentations designed to portray the union as ineffectual and unionization as leading to plant closures. The Board, however, refused the petition of the union to set the election aside because forgery of documents was not involved. 263 N.L.R.B. at 133.

5. 765 F.2d at 911 (citing *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 133 (1982)).

## II. FACTS

### A. THE ELECTION CHALLENGE

On June 3, 1982, a consent election was held among Best Products' sixty-nine sales and warehouse workers at its Campbell, California facilities.<sup>6</sup> The union, Local 428 of the United Food and Commercial Workers, won a majority of the votes cast.<sup>7</sup> The employer immediately filed two objections to the election with the NLRB. First, Best alleged that the Board Agent supervising the election violated the pre-election consent agreement when he allowed the union to use two election observers while the employer had only one observer available.<sup>8</sup> Second, it charged that the union had engaged in campaign misrepresentations.<sup>9</sup> The employer argued that these flaws in the election were so prejudicial to the possibility of a fair election that the vote should be set aside.<sup>10</sup>

### B. THE BOARD'S DECISION

Best's challenges to the election were investigated by the NLRB Regional Director, utilizing the standard handed down on August 4th, 1982 in the Board's decision in *Midland National Life Insurance Company*.<sup>11</sup> Based on this rule, the Regional Director dismissed the misrepresentations challenge and

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6. 765 F.2d at 905-06. A consent election is one in which the details of the election, such as date, place, and voter list are agreed upon by the parties without the need of a formal hearing and decision by the Board. 29 C.F.R. § 101.19 (1985). In *Best Products*, the "Stipulation for Certification Upon Consent Election" signed by the employer, the union, and Board representatives provided that "each party . . . will be allowed to station an equal number of authorized observers . . . at the polling places during the election to assist in its conduct, to challenge the eligibility of voters and to verify the tally." 765 F.2d at 905-06.

7. *Id.* at 906.

8. *Id.*

9. *Id.* at 909. The alleged misrepresentations were: that Local 428 falsely compared the wages at Best with those of a unionized competitor; that the union falsely alleged that Best had threatened to close the store and to reopen with non-union employees if the union won; and that the union falsely stated that the union had filed an unfair labor practice charge against Best. *Id.*

10. *Id.* at 906.

11. *Id.* (citing *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 131 (1982)). The NLRB Regional Director investigated Best's objections and on June 26, 1982, issued a "Report and Recommendations on Objections" in which he ordered a hearing. 765 F.2d at 906.

ordered a hearing only on the challenge concerning the number of observers.<sup>12</sup> At the hearing this objection was also denied and the election was certified.<sup>13</sup> Best then refused to bargain with the newly certified union.<sup>14</sup> The instant case reached the Ninth Circuit when the Board filed a petition seeking judicial enforcement of its order that Best cease violating sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act<sup>15</sup> and commence bargaining with the union.<sup>16</sup>

### III. BACKGROUND

The National Labor Relations Act (NLRA) was enacted to ensure that employees have the right to self-organize, to form unions, to bargain collectively, and to engage in other concerted acts for mutual aid and protection.<sup>17</sup> Under section 9 of the Act, a union certification election is conducted when a group of employees file a petition and the Board is convinced that a question of representation exists.<sup>18</sup> If a majority of the employees vote in favor of unionization, the union selected gains the right to be the exclusive representative of the employees for collective bargaining over wages, hours, and other terms and conditions of employment.<sup>19</sup> Section 8 of the Act proscribes any conduct by the employer or the union which disrupts the possibility of employee free choice during the campaign.<sup>20</sup>

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12. 765 F.2d at 906. When the *Midland* case was decided by the Board on August 4, 1982, the Director issued a supplemental report noting that only the imbalance in observers objection would be heard. At the hearing, held on March 7, 1983, the hearing officer concluded that Best's objections should be overruled and the union certified. *Id.*

13. *Id.*

14. *Id.* at 905-06. The employer filed objections to this report but on March 28, 1984, the Board upheld the hearing officer's decision. The employer then refused to bargain. Local 428 filed an unfair labor practice charge with the NLRB. The Board concluded that Best had violated sections 8(a)(1) and 8(a)(5) of the NLRA. It ordered Best to cease these violations and commence bargaining with the union. *Id.*

15. National Labor Relations Act, §§ 8(a)(1), 8(a)(5), 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1976). Section 8(a)(1) makes it an unfair labor practice for an employer to restrain or coerce employees in the exercise of their rights to organize under section 7 of the Act. Section 8(a)(5) makes it an unfair labor practice for an employer to "refuse to bargain collectively with representatives of his employees." 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1976).

16. 765 F.2d at 905.

17. National Labor Relations Act § 7, 29 U.S.C. § 157 (1976).

18. *Id.* § 9, 29 U.S.C. § 159.

19. *Id.*

20. *Id.* §§ 8(a)(1), 8(a)(5), 8(b)(1), 29 U.S.C. §§ 158(a)(1), 158(a)(5), 158(b)(1). Sec-



While the NLRA set out this general framework, Congress left the NLRB with the task of developing detailed regulations for running union certification elections.<sup>21</sup> Utilizing this mandate, the Board has developed comprehensive guidelines both through official regulations and through case law. Two general areas of these guidelines were at issue in *Best Products*: the regulation of the number of observers used by either party at the polling place and the standard to be applied in judging campaign misrepresentations.<sup>22</sup>

The NLRB's key policies concerning observers are set forth in several of its official regulation manuals.<sup>23</sup> The regulations provide that each party will be allowed to station observers at the polling places in order to identify voters.<sup>24</sup> They also allow the use of more than one observer per side, even in a small election.<sup>25</sup> The tasks of the observers are uncomplicated and the Board Agent can properly train them within minutes of the election.<sup>26</sup>

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tion 8(a)(1) states that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(5) states that "[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . . ." Section 8(b)(1) provides that it shall be an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in section 7. 29 U.S.C. §§ 158(a)(1), 158(a)(5), 158(b)(1) (1976).

21. *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940). The court stated that the "control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone." *Id.*

22. 765 F.2d at 905.

23. *E.g.*, NLRB, CASEHANDLING MANUAL (PART TWO) REPRESENTATION PROCEEDINGS (April 1984) [hereinafter cited as NLRB, CASEHANDLING MANUAL]; NLRB, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8, AS AMENDED (1982); OFFICE OF THE GENERAL COUNSEL, NLRB, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES (June 1974). *See also* 29 C.F.R. §§ 101.19, 102.69(a) (1984) (section 101.19 sets out the NLRB's policies concerning consent elections; section 102.69 discusses Board procedures for conducting certification elections; each of these regulations authorizes the use of observers).

24. *E.g.*, NLRB, CASEHANDLING MANUAL, *supra* note 23, ¶ 11,310 (1984). "Each party may be represented at the polling places by an equal, predesignated number of observers." *Id.*

25. *Id.* "There may be one observer per party per checking table and one observer per party at the ballot box, plus observers necessary for relief, ushering, and other assistance." *Id.*

26. *Id.* at ¶ 11,318. "The Board agent(s) and observers should assemble at the polling place from 15 to 45 minutes (depending on the complexity of the election) prior to the opening of the polls . . . . Substitutes should be procured for absentees." *Id.* "If this has not already been done, a copy of the Instructions to Observers, Form NLRB-722,

The NLRB has interpreted these regulations concerning election observers in several leading decisions. In *Westinghouse Appliance Sales and Service Co., a Division of Westinghouse Electric Corp.*,<sup>27</sup> the Board Agent had allowed the union to station two observers at the polling place even though the employer had only one observer available.<sup>28</sup> The Board upheld the validity of the election, reasoning that this imbalance did not create the impression that the Board favored the union.<sup>29</sup> Nor was actual favoritism found, since the agent specifically advised the employer of his right to provide an additional observer.<sup>30</sup>

However, in *Summa Corp. v. NLRB*,<sup>31</sup> the court refused to enforce an NLRB bargaining order because of an imbalance in the number of employer and union observers at a representation election.<sup>32</sup> The Board Agent had consented to an additional union observer without consulting the observers for the employer.<sup>33</sup> The court felt that this materially affected the election process because it created the impression of union predominance and favoritism on the part of the Board.<sup>34</sup>

Similarly, in *Barceloneta Shoe Corp.*,<sup>35</sup> the Board set aside an election due to an imbalance in the number of observers.<sup>36</sup> The union and the employer had entered into a consent agreement allowing each party to designate an equal number of observers.<sup>37</sup> However, the employer later refused to allow an employee it had unlawfully discharged to serve as an observer.<sup>38</sup> The Board deemed the consent agreement to be a contract, and the denial of a party's contractual right to designate and use the employee of its choice as an observer to be an infringement of a

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should be given to each observer. He/she should be given the opportunity to read it and ask additional questions. The observers should be instructed as to their specific tasks of the day." *Id.* ¶ 11,318.2.

27. 182 N.L.R.B. 481 (1970).

28. *Id.* at 481 n.1.

29. *Id.*

30. *Id.*

31. 625 F.2d 293 (9th Cir. 1980).

32. *Id.* at 295.

33. *Id.*

34. *Id.* at 295-96.

35. 171 N.L.R.B. 1333 (1968).

36. *Id.* at 1334.

37. *Id.*

38. *Id.* at 1335.

material term of the contract which warranted setting aside the result of the consent election.<sup>39</sup>

The second area of the NLRB's guidelines at issue in *Best Products* concerned the standard to be applied in judging the effects of misrepresentations on the fairness and impartiality of election campaigns.<sup>40</sup> In the past twenty years the Board has taken a seesaw approach, changing its policy on four different occasions.<sup>41</sup> In 1962, in *Hollywood Ceramics Co.*,<sup>42</sup> the Board held that a representation election would be set aside if one party had engaged in substantial misrepresentations just before election time, reasoning that these misrepresentations would have a significant impact on the vote and the other party would not have sufficient time to make an effective reply.<sup>43</sup>

Fifteen years later, in *Shopping Kart Food Market*,<sup>44</sup> the Board overruled *Hollywood Ceramics* and decided that misrepresentations of fact alone would no longer suffice as a reason to set aside a representation election.<sup>45</sup> The Board held that an election would be set aside only if a party has used forged documents or improperly involved the Board so as to destroy the

39. *Id.* at 1343.

40. 765 F.2d at 910-11.

41. *Id.* at 910.

42. 140 N.L.R.B. 221 (1962). On the afternoon before the election, the union distributed a handbill to the employees containing a table purporting to compare wage rates at the Hollywood Ceramics plant with those at unionized ceramics plants. The comparison was misleading in that it included a 30% incentive payment for the unionized plants but failed to include an existing incentive plan for the employer's plant. Furthermore, the plants used as comparison were not truly comparable in type of operations and degree of skill. *Id.* at 222-23.

43. *Id.* at 224. The Board stated that its general policy is to maintain "laboratory conditions" under which employees can exercise their right to choose their own representatives. *Id.* at 223. A vague or inartistic representation will not necessarily disturb the setting and will not require an election to be set aside. *Id.* at 224. However, when a misrepresentation is substantial and would be likely to have a real impact on the election, the bounds of fair lawful electioneering are exceeded and the free choice of employees is interfered with. Therefore, a second election should be conducted. *Id.* at 226.

44. 228 N.L.R.B. 1311 (1977). In *Shopping Kart*, on the evening before the election, the union vice president told the employees that the employer had made a profit of \$500,000 in the past year when in fact the profit had been only \$50,000. *Id.* at 1311.

45. *Id.* at 1313. The Board stated that the *Hollywood Ceramics* rule had been based on a false view of the employees as "naive," "unworldly," and in need of protection from misrepresentations. *Id.* In rejecting this view, the Board stated that "Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." *Id.*

possibility of employee free choice.<sup>46</sup>

The Board interpreted the phrase "improperly involving the Board and its processes," later that same year, in *Formco, Inc.*<sup>47</sup> In *Formco*, the union had falsely reported that the employer had been found guilty of unfair labor practices.<sup>48</sup> The Board held that these false reports improperly involved the Board and implied that the Board had endorsed the union in the election.<sup>49</sup> On this basis, the union's election victory was set aside.<sup>50</sup>

Only a scant twenty months later, the Board overturned the new *Shopping Kart* standard in *General Knit of California, Inc.*<sup>51</sup> The Board held that misrepresentations of fact affect the way that employees vote and undermine the integrity of the election process.<sup>52</sup> The Board stated that it had a responsibility to ensure employee free choice and thus it was returning to the *Hollywood Ceramics* standard of tight regulation.<sup>53</sup>

The Board's latest policy reversal occurred in August 1982 in *Midland National Life Insurance Co.*<sup>54</sup> Once again the Board returned to the reasoning in *Shopping Kart* and overruled *General Knit* and *Hollywood Ceramics*.<sup>55</sup> The Board put forth what

46. *Id.* The Board reasoned that the *Hollywood Ceramics* rule had actually impeded employee free choice by leading to extensive Board analysis of campaign propaganda, restriction of free speech, and widely varying standards of application. *Id.* at 1312.

47. 233 N.L.R.B. 61 (1977).

48. *Id.* at 62.

49. *Id.* The Board decided that this constituted substantial mischaracterization and misuse of a Board document for partisan election purposes. *Id.* at 61.

50. *Id.* at 61. Since the Board is consistent in "jealously guarding against any intrusion or abuses of its processes" for fear that this will place the Board's neutrality in question, this misrepresentation warranted setting aside the election. *Id.* at 62.

51. 239 N.L.R.B. 619 (1978). In *General Knit*, the union had distributed a leaflet to the employees on election day which stated that the company had earned a profit of \$19.3 million in 1976 when in fact it had sustained a loss of more than \$5 million. *Id.* at 619.

52. *Id.* at 621.

53. *Id.* at 623. The NLRB Regional Director had considered and rejected the employer's election objections, utilizing the *Shopping Kart* standard. *Id.* at 619. However, the Board declined to enforce his order and remanded the case to have the Regional Director investigate the facts further under the old *Hollywood Ceramics* standard. *Id.* at 624.

54. 263 N.L.R.B. 127 (1982). In *Midland*, the Board refused to set aside an election where the employer misrepresented the effects unionization would have because the use of forged documents was not involved. *Id.* at 133.

55. *Id.* at 129.

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has become known as the *Midland* rule:

[W]e will no longer probe into the truth or falsity of the parties campaign statements . . . no[r] set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is.<sup>56</sup>

In effect, the Board had returned to the hands off standard of *Shopping Kart*. However, the Board went even a step further towards deregulation in its decision in *Affiliated Midwest Hospital, Inc.*<sup>57</sup> This case held that mischaracterizations of Board actions should not be equated with physical alteration of a Board document.<sup>58</sup> By themselves these mischaracterizations should be treated no differently than any other misrepresentations.<sup>59</sup> Thus false allegations that one party to the election had been found guilty of unfair labor practices would not rise to the level of "improperly involving the Board and its processes." *Formco, Inc.* was therefore expressly overruled.<sup>60</sup>

The Board's adoption of the *Midland* rule and its standard of election deregulation has not gone uncriticized by the federal circuits. In *NLRB v. New Columbus Nursing Home, Inc.*,<sup>61</sup> the Board had applied the *Midland* rule and rejected the employer's misrepresentation challenges to an election.<sup>62</sup> The First Circuit enforced the Board's order requiring the employer to bargain.<sup>63</sup> A concurring opinion agreed with the instant result, since it

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56. *Id.* at 133.

57. 264 N.L.R.B. 1094 (1982). In *Midwest Hospital*, the union distributed a leaflet stating that "the Regional Director of the National Labor Relations Board found reasonable cause that the Hospital had violated the law." *Id.* In fact a nonadmission settlement had been agreed to and no Board complaint had ever been issued. *Id.*

58. *Id.* at 1095.

59. *Id.*

60. *Id.* The Board reasoned that statement that the Board had issued a complaint against the employer did not convey to the employees the impression that the Board favors one party in the election. Otherwise, even truthful statements to this effect would have to be barred. *Id.*

61. 720 F.2d 726 (1st Cir. 1983).

62. *Id.* at 729. The employer alleged that a letter sent by the union to employees falsely stated that the union was financially solvent when in fact the local's balance sheet showed liabilities equal to three times its total assets. *Id.*

63. *Id.*

found the misrepresentation not material, but it criticized the general application of the *Midland* rule as providing virtually unbridled license and creating a strong temptation to tell last minute lies.<sup>64</sup> It characterized the new *Midland* rule as “burning down the barn to get rid of the rats; an abnegation of the Board’s recognized duty to ensure a fair and free choice of bargaining.”<sup>65</sup>

*Van Dorn Plastic Machinery Co. v. NLRB*<sup>66</sup> involved a charge by the employer that an election should be set aside because of a wage misrepresentation contained in a union flyer distributed shortly before the election.<sup>67</sup> Like the court in *New Columbus*, the Sixth Circuit was reluctant to wholeheartedly endorse the *Midland* rule.<sup>68</sup> While it applied the rule to the case before it and dismissed the employer’s election challenge, the court left open the question of whether it would uphold the application of the rule to situations where the misrepresentation was more artful and deceptive, where the employees could not separate truth from falsehood, and where their right to a free and fair election would be jeopardized.<sup>69</sup>

#### IV. THE COURT’S ANALYSIS

##### A. THE IMBALANCE IN THE NUMBER OF OBSERVERS

The Ninth Circuit reasoned that the union’s request to use two observers only minutes before the election was to begin was neither contrary to established Board procedures nor a violation of the pre-election consent agreement.<sup>70</sup> Even in a small election the parties are each allowed more than one observer as an aid in identifying voters.<sup>71</sup> Similarly, the consent agreement provided only that each side would have an equal number of observers.<sup>72</sup> It did not place absolute limits on the number of observers.<sup>73</sup>

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64. *Id.* at 730 (Aldrich, J. concurring).

65. *Id.* The concurring opinion cited *New York Times v. Sullivan*, to support its view that protection of free speech has never extended to intentionally false, material misstatements. *Id.* (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

66. 736 F.2d 343 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1173.

67. *Id.* at 345.

68. *Id.* at 348.

69. *Id.*

70. 765 F.2d at 907.

71. *See*, NLRB, CASEHANDLING MANUAL, *supra* note 23, ¶¶ 11,310, 11,318 (1984).

72. 765 F.2d at 907.

73. *Id.*

The Board Agent conducting the election gave the employer the opportunity to use a second observer as well. The employer's refusal to provide a second observer reflected its own free choice and, according to the court, was not grounds for overturning the election.<sup>74</sup>

The court distinguished the facts in *Best Products* from those in *Summa Corp. v. NLRB*<sup>75</sup> and *Barceloneta Shoe Corp.*<sup>76</sup> which the employer had contended were controlling.<sup>77</sup> In *Summa*, the Board Agent had shown actual favoritism by allowing the union to use an additional observer without first consulting with the employer.<sup>78</sup> But any appearance of favoritism due to the imbalance in observers in *Best Products* was of the employer's own making.<sup>79</sup> In *Barceloneta*, the election was set aside when one party violated the consent agreement by refusing to allow a certain employee to serve as an observer.<sup>80</sup> By contrast, in providing two observers, the union in *Best Products* was simply exercising a right given to it by the consent agreement.<sup>81</sup> Thus the court reasoned that the election process was not significantly impaired by this action and the Board's decision not to set aside the election on this basis must be supported.<sup>82</sup>

#### B. THE MISREPRESENTATION ISSUE

The Ninth Circuit agreed with the Board's decision to utilize the standard set out in *Midland National Life Insurance Co.*<sup>83</sup> to analyze the misrepresentation challenge.<sup>84</sup> The court found that the rule summarily disposed of the instant case, be-

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74. *Id.* at 907. In *San Francisco Bakery Employer Association*, the employer refused to let a union observer leave work during the election to serve at the polls. 121 N.L.R.B. 1204, 1206 (1958). However, the Board refused to set aside the election because the resultant imbalance in observers was due to the union's own lack of diligence in failing to make prior arrangements with the employer to allow for the employee's release from work. *Id.* at 1206.

75. 625 F.2d 293 (9th Cir. 1980).

76. 171 N.L.R.B. 1333 (1968).

77. 765 F.2d at 908.

78. 625 F.2d at 295.

79. 765 F.2d at 908 n.6.

80. 171 N.L.R.B. at 1335.

81. 765 F.2d at 908.

82. *Id.*

83. 263 N.L.R.B. 127 (1982).

84. 765 F.2d at 913.

cause neither forgery nor improper involvement of the Board were involved.<sup>85</sup>

In approving the NLRB's development of the *Midland* rule, the Ninth Circuit found that the new standard was rational and consistent with the NLRA.<sup>86</sup> The rule was based both on the NLRB's own past experience under the standards of *Hollywood Ceramics Co.*,<sup>87</sup> *Shopping Kart Food Market*,<sup>88</sup> and *General Knit of California, Inc.*,<sup>89</sup> as well as on empirical studies and the views of academic specialists.<sup>90</sup> In particular, the court put great weight on a study by Professor Julius Getman of Indiana University and Professor Stephen Goldberg of Northwestern University.<sup>91</sup> This study found that employees generally paid very little attention to the content of election propaganda and that the votes of the vast majority of the employees could be correctly predicted from their precampaign intent and their attitudes about unions and working conditions in general.<sup>92</sup> The Ninth Circuit accepted the conclusion of the study that Board supervision of the content of election propaganda operated more to frustrate employee free choice than to ensure it.<sup>93</sup> Thus the court held that the deregulation inherent in the *Midland* rule struck a proper balance between the principle of majority rule and the opposing principles of ensuring certainty and finality of the election by preventing dilatory attacks upon the results.<sup>94</sup>

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85. *Id.* at 910.

86. *Id.* at 912.

87. 140 N.L.R.B. 221 (1962).

88. 228 N.L.R.B. 1311 (1977).

89. 239 N.L.R.B. 619 (1978).

90. 765 F.2d at 912-13.

91. Getman and Goldberg, *The Behavioral Assumptions Underlying N.L.R.B. Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976). The authors selected 31 union election campaigns where there was likely to be vigorous and possibly unlawful campaigning. *Id.* at 265. They interviewed individual employees at different stages of the campaign asking them how they intended to vote and ultimately how they did vote. *Id.* at 266-67. In 22 of the 31 elections the NLRB later found that unlawful campaigning did in fact occur. *Id.* at 265.

92. 765 F.2d at 912 (citing Getman and Goldberg, *supra* note 91, at 276-79).

93. 765 F.2d at 912 (citing Getman and Goldberg, *supra* note 91, at 283).

94. 765 F.2d at 912 (citing *NLRB v. Berryfast, Inc.*, 741 F.2d 1161 (9th Cir. 1984)). In *Berryfast*, the union won a representation election by one vote. 741 F.2d at 1162. The employer argued that the election should be set aside because an eligible pro-company voter had been disenfranchised through no fault of her own. *Id.* But the Board found that the employee did not take reasonable steps to vote because she neither went to the polling place nor sought out the Board Agent to find out why her name was not on the voting list. The Board balanced the need to assure that all eligible employees have a



The court concluded that since there was a reasonable basis in law for the Board's change of policy to the *Midland* rule, deference should be given to the Board's decision to effect that change.<sup>95</sup>

In applying the new rule to the instant case, the court rejected Best's argument that an exception to *Midland* should be carved out here due to the nature of the union's misrepresentations.<sup>96</sup> The court noted that *Formco, Inc.*, upon which the employer relied, had been expressly overruled by the NLRB in *Affiliated Midwest Hospital, Inc.*<sup>97</sup> The court accepted the Board's reasoning in *Midwest Hospital* that while forged Board documents would confuse the voters, simple misrepresentations of Board actions would not.<sup>98</sup> The Board's actions would speak for themselves and reveal any misrepresentations to be false.<sup>99</sup> Since no forgery was involved in this case, under a *Midwest Hospital* analysis, the employer's election objections had no merit.<sup>100</sup>

The Ninth Circuit also distinguished the nature of the misrepresentations in the instant case<sup>101</sup> from those facing the Sixth Circuit in *Van Dorn Plastic Machinery Co. v. NLRB*<sup>102</sup> and the First Circuit in *New Columbus Nursing Home, Inc.*<sup>103</sup> The court

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chance to vote against the competing policy of promptly completing election proceedings and decided to uphold the election. *Id.*

95. 765 F.2d at 913 (citing *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981)). In *Hendricks*, the issue involved the Board's practice of "excluding from collective bargaining units only those confidential employees with a 'labor nexus' while rejecting any claim that all employees with access to confidential information are beyond the reach of [the NLRA]. . . ." 454 U.S. at 176. The Supreme Court upheld the Board's policy, reasoning that the Court should normally defer to an administrative agency's construction of a statute which it is charged with executing. *Id.* at 177. This is proper as long as there is a reasonable basis in law for this construction. *Id.* at 176.

96. *Id.* at 912. Local 428 made false statements that Best had threatened to close the store if the union prevailed and that Local 428 had filed an unfair labor practice charge in response. *Id.* at 909. Best argued that these statements constituted improperly involving the Board and its processes and thus justified Board involvement. *Id.* at 911.

97. *Id.* (citing *Affiliated Midwest Hospital, Inc.*, 264 N.L.R.B. 1094, 1095 (1982)).

98. 765 F.2d at 911 (citing *Affiliated Midwest Hospital, Inc.*, 264 N.L.R.B. 1094, 1095 (1982)).

99. 264 N.L.R.B. at 1095.

100. 765 F.2d at 911 (citing *Affiliated Midwest Hospital, Inc.*, 264 N.L.R.B. 1094, 1094 (1982)).

101. 765 F.2d at 911-12 n.9. See also text accompanying notes 50-58 (explaining the criticisms of *Midland* by the First and Sixth Circuits).

102. 736 F.2d 343 (6th Cir. 1984).

103. 720 F.2d 726 (1st Cir. 1983).

found that the union misrepresentations in *Best Products* fell far short of the all pervasive lying that had concerned the other circuits.<sup>104</sup> Thus there was no need for the Ninth Circuit to consider carving out an exception to *Midland* here.<sup>105</sup>

The Ninth Circuit also rejected the employer's argument that the new *Midland* rule should not be applied retroactively to the instant case.<sup>106</sup> Although *Midland* was decided two months after the election in *Best Products*, the new rule was issued before the Board had ruled on Best's election challenges.<sup>107</sup> Thus the Board utilized the *Midland* standard in analyzing the employer's objections.<sup>108</sup> In reviewing the Board's decision, the Ninth Circuit, therefore, was not retroactively applying a new rule to a Board decision based on the old standard.<sup>109</sup> Even though the court's use of the *Midland* rule could be considered retroactive application, the Ninth Circuit felt that it was proper to apply the new rule because appellate courts ordinarily utilize the law in effect at the time of the appellate decision.<sup>110</sup> While a court would normally remand the case to the administrative agency which has changed its policy to decide if the new rule should be applied retroactively,<sup>111</sup> this was not necessary in *Best Products*.<sup>112</sup> The Board had already expressed its wish that *Mid-*

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104. 765 F.2d at 911 n.9. The misrepresentations in *Best Products* concerned wage comparisons, rumors of plant closures, and false reports of NLRB charges. *Id.* at 909.

105. *Id.* at 912.

106. *Id.* at 911.

107. *Id.* at 906.

108. *Id.*

109. *Id.* at 913.

110. *Id.* (citing *Bradley v. Richmond School Board*, 416 U.S. 696, 716 (1974)). The Supreme Court in *Bradley* held that when Congress enacted a new statute, it should be applied to an issue pending resolution on appeal which would be affected by the statute. 416 U.S. at 716. The origin of this rule traces back to Justice Marshall's decision in *United States v. Schooner Peggy* in which he stated "[I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 1 Cranch 103, 110 (1801).

111. *NLRB v. Food Store Employees Union Local 347*, 417 U.S. 1, 10 n.10 (1974). The union, as charging party, was initially denied reimbursement for attorneys fees by the Board. *Id.* at 3. But while the issue was on appeal the Board changed its policy on reimbursement. *Id.* at 6-7. The Supreme Court noted that it was necessary for the appellate court to remand the case back to the Board for its opinion on whether giving the change retroactive effect would best effectuate the policies underlying the NLRA. *Id.* at 10 n.10.

112. 765 F.2d at 913.

*land* be applied retroactively<sup>113</sup> and the court deferred to that wish.<sup>114</sup>

### C. THE UNION'S MAJORITY STATUS

The Ninth Circuit summarily rejected the last of the employer's objections to the Board's order to bargain.<sup>115</sup> Best had argued that the union had lost its majority status due to employee turnover.<sup>116</sup> But the court reasoned that the union enjoyed an irrebuttable presumption that it represented a majority of the employees for a reasonable time, which was found to be one year.<sup>117</sup> This time was measured from the date on which the employer began to bargain in good faith.<sup>118</sup> Here the court found that the one-year period had not begun to run since Best had

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113. 263 N.L.R.B. at 133 n.24. "In accordance with our usual practice, we shall apply our new policy not only 'to the case in which the issue arises,' but also 'to all pending cases in whatever stage.'" *Id.* at 133 n.24 (quoting *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995, 1006-07 (1958)).

114. 765 F.2d at 913. In *Bradley v. Richmond School Board*, an exception to this deferral was found to be appropriate in cases where manifest injustice would otherwise result. 416 U.S. 696, 716 (1974). The court in *Best Products* stated that the exception did not apply because "no manifest injustice would flow from the decision to abide by the Board's policy here." 765 F.2d at 913.

115. 765 F.2d at 913.

116. *Id.*

117. See, e.g., *Financial Inst. Employees of America v. NLRB*, 752 F.2d 356, 365 (9th Cir. 1984). The employer refused to bargain with the certified local union, claiming that the local's decision to affiliate with an international union removed the employer's duty to bargain. *Id.* at 358. The Ninth Circuit found that the duty would continue because the new successor union was not substantially changed by the affiliation. *Id.* at 361. The court reasoned that "the most valued objective of the Act [NLRA] is industrial peace" and that this is "more likely to be achieved by maintaining continuity in the bargaining structure." *Id.* at 365 (quoting *NLRB v. Silver Spur Casino*, 623 F.2d 571, 578 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981)). In employer refusal to bargain situations the one year presumption of majority status after initial Board certification is irrebuttable even in the absence of a contract. 752 F.2d at 365.

118. See, e.g., *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962). In *Mar-Jac*, the union won a certification election in November of 1959. *Id.* at 786. The employer refused to bargain, leading to the union filing an unfair labor practice charge with the Board. On August 9, 1960 a settlement agreement was entered into in which the employer agreed to bargain in good faith. But on March 29, 1961 the employer petitioned the Board for a new election, claiming that the one year period was up and the employer now had a good faith doubt that the union continued to represent a majority of the employees. *Id.* However, the Board dismissed the petition, holding that the one year period should be measured from the date that the employer begins to bargain in good faith. *Id.* at 787. To permit the employer to obtain a new election would "allow it to take advantage of its own failure to carry out its statutory obligation. . . ." *Id.*

yet to commence good faith bargaining.<sup>119</sup>

## V. CRITICAL ANALYSIS

The narrow issue presented to the Ninth Circuit in *Best Products* was how the NLRB should treat misrepresentations by unions in election campaigns. The court decided to analyze the alleged misrepresentations by Local 428 under the deregulation approach put forth by the NLRB in its decision in *Midland National Life Insurance Co.*<sup>120</sup> Under this view the election was upheld, since no forgery or improper Board involvement were found.<sup>121</sup>

By adopting the *Midland* rule, the Ninth Circuit gave its stamp of approval to the view that employees pay little attention to campaign propaganda from either the union or the employer. Because of this belief, the court felt that misrepresentations should be largely deregulated and the Board should keep its hands off the campaign. By rejecting dilatory attacks on the election results and eliminating the need for lengthy hearings on misrepresentation challenges, prompt completion of the election proceedings will be facilitated.<sup>122</sup>

In this narrow sense the decision in *Best Products* is a correct one. To some small extent, adoption of the *Midland* rule will speed up the election procedure and help prevent the abuse of Board processes to delay certification. In the past employers have often abused Board processes by challenging every minor union misrepresentation, reasoning that even unsuccessful challenges result in certification delays of two to three years.<sup>123</sup> On the other hand, unions infrequently challenge elections due to employer misrepresentations, reasoning that it is much faster to

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119. 765 F.2d at 914.

120. *Id.* at 913 (citing *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 133 (1982)).

121. 765 F.2d at 913.

122. *Id.* at 912 (citing *NLRB v. Berryfast, Inc.*, 741 F.2d 1161, 1162 (9th Cir. 1984)).

123. *See, e.g.*, *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1173 (1985); *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1st Cir. 1983); *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978); *Formco, Inc.*, 233 N.L.R.B. 61 (1977); *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962) (in each of these leading cases the employer was the party challenging the election claiming misrepresentation by the union).

simply wait for the twelve-month election bar to expire and then file for a new election than it is to go through the lengthy unfair labor practices procedure.<sup>124</sup> Thus the new rule should come to be favored by unions and should promote the overall policy of the National Labor Relations Act of protecting the right of employees to self-organize. In addition, the hesitations that other circuits have had in applying the *Midland* rule do not seem to apply here. The misrepresentations in *Best Products* were not the sort of artful and deceptive falsehoods that the First and Sixth Circuits felt should be excepted from the *Midland* rule.<sup>125</sup>

But in a broader sense the decision in *Best Products* represents a failure of the Ninth Circuit to address a more fundamental issue raised by this case. Private sector union membership in the United States has declined from a peak of near 38% in 1954 to 21% in 1980 and the downward trend continues.<sup>126</sup> Union success rates in certification elections have declined from nearly 80% in the early 1940s<sup>127</sup> to 46.2% in 1981.<sup>128</sup> This decline is due to a broad range of factors, of which the use of misrepresentations by employers is one part. The decline reflects an upsurge in employer union busting efforts and the inability of current legislation to successfully protect the right of employees to self-organize under section 7 of the NLRA, along with the failure of the courts and the NLRB to deal with this decline through case

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124. Section 9(c)(3) of the NLRA sets out the election bar rule: "no election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159(c)(3) (1976). Thus a union which loses a representation election in which it alleges that the employer committed misrepresentations has a choice. It can wait twelve months and file for a new election. Or it can file an unfair labor practice charge against the employer alleging campaign misrepresentations. If the employer is prepared to carry the appeal process to the limit, even if the charge is upheld and the union wins, the procedure often takes two to three years. The only Board remedy at the end of this period is an order for a new election and the posting of a notice in the workplace that the employer has been found guilty of an unfair labor practice. Because of the paucity of this remedy, unions often forego filing an unfair labor practice charge and simply wait out the twelve month election bar period.

125. See *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), cert. denied, 105 S. Ct. 1173 (1985); *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1st Cir. 1983); See *supra* text accompanying notes 50-58 (explanation of the facts and holdings of *Van Dorn* and *New Columbus*).

126. Weiler, *Promises to Keep: Securing Worker's Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771 n.4 (1983).

127. See 7 NLRB Ann. Rep. 88-89 (1942); 8 NLRB Ann. Rep. 96 (1943); 9 NLRB Ann. Rep. 86 (1944).

128. 46 NLRB Ann. Rep. 205 (1981).

law.<sup>129</sup> The current reality is that the present checks on employer misconduct do not work and the result is that the employer who commits the greatest number of violations of the NLRA is the most likely to win a certification election.<sup>130</sup>

If this trend is to be reversed, and the NLRA's goal of ensuring employee free choice in election campaigns furthered, then much more fundamental election reform is needed than a simple return to the old *Shopping Kart Food Market* standard.<sup>131</sup> Professors Getman and Goldman, upon whose study the *Midland* rule was based, proposed a number of campaign reforms in addition to deregulation of election propaganda. These proposals included shifting the burden of proof in discriminatory discharge cases during election campaigns to the employer and requiring mandatory injunctions against them, triple back pay remedies, and denial of government contracts to recidivist employers.<sup>132</sup> Another academic expert has further proposed that unions be given a chance to respond on company time and premises to employer captive audience speeches and that union organizers be allowed greater access to the employer's premises.<sup>133</sup> In adopting *Midland's* deregulation without the accompanying reforms to strengthen and expedite the sanctions against illegal speech or action, the Ninth Circuit has taken the heart out of Getman and Goldberg's proposed reforms.

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129. See generally *Pressures In Today's Workplace, Oversight Hearings Before The Subcommittee On Labor-Management Relations Of The House Committee On Education And Labor*, 96th Cong., 1st Sess. 408-42 (1979) (statement of Robert A. Georgine, President of the Building and Construction Trades Department of the AFL-CIO). Georgine discusses the growth of union-busting during the 1970s and details the methods by which employers utilize attorneys and labor relations consultants to openly flaunt the law. See *infra* text accompanying notes 131-37.

130. Eames, *An Analysis of the Union Voting Study from a Trade-Unionists Point of View*, 28 STAN. L. REV. 1181, 1191 (1976).

131. 228 N.L.R.B. 1311 (1977). See generally Eames, *supra* note 130 and *infra* note 133; Weiler, *supra* note 126 and *infra* note 133.

132. J. GETMAN, S. GOLDBERG, & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 155-56 (1976).

133. Eames, *supra* note 130, at 1192. Eames criticized the Getman and Goldberg study upon which the *Midland* rule was based. She argued that instead of focusing upon the 81% of the employees who had already made up their minds about how to vote, the 19% remaining should be examined because their votes often determine who wins the election. *Id.* at 1186. While this 19% statistical difference was thought by Getman and Goldberg to be statistically insignificant, Weiler noted that a shift of only two percent in the total number of votes cast in the elections studied, if carefully allocated, would have led to a 100% increase in the number of union victories. Weiler, *supra* note 126, at 1784-85.

However, even these reforms may be ineffective because the incentives for employer violations are too great to be blunted by such changes.<sup>134</sup> As an alternative means of reducing the opportunities for violations, the entire election campaign could be eliminated.<sup>135</sup> Once a union obtains an authorization card majority, certification could be granted either automatically or upon victory in an immediate election.<sup>136</sup> This would eliminate the opportunity for a professionally run anti-union campaign replete with misrepresentations and unfair labor practices.<sup>137</sup> This is essentially the procedure used in the Canadian labor law system. In Canada, dispensing with the protracted campaign has eliminated most of the chances for illegal intimidation and reduced the rate of employer unfair labor practices to a fraction of the American rate.<sup>138</sup>

The kinds of reforms proposed here would require extensive legislative changes in the NLRA and a greater willingness on the part of the courts and the NLRB to face up to and deal with the decline in unionization in the U.S. It is true that the Ninth Circuit in *Best Products* could not rewrite the NLRA by itself. However, given the wide latitude in interpreting and fleshing out the basic guidelines of the NLRA granted to the NLRB and the courts by Congress, the Ninth Circuit could certainly have done more than seek refuge in the hands-off approach of *Best Products*.

## VI. CONCLUSION

The Ninth Circuit's decision in *NLRB v. Best Products Co.* has set a clear standard by which both employers and unions can judge their campaign statements. By limiting to the use of forged documents the grounds upon which misrepresentations will be held to be unfair labor practices, the court has set forth a rule which will help prevent dilatory attacks on election results and will speed up the certification process. But in adopting deregulation without recognizing the need for still further reforms the court has ignored the much more fundamental problem of

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134. Weiler, *supra* note 126, at 1804.

135. *Id.* at 1804-22.

136. *Id.* at 1805.

137. *Id.*

138. *Id.* at 1821.

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how to truly further the NLRA's goal of ensuring employees' rights to self-organize.

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