Marquette Law Review

Volume 66
Issue 4 *Summer 1983*

Article 5

1983

Excessive Restrictions on Employers' Predictions During Union Representation Campaigns

Michael J. Bennett

COMMENT

EXCESSIVE RESTRICTION ON EMPLOYERS' PREDICTIONS DURING UNION REPRESENTATION CAMPAIGNS

I. INTRODUCTION

The National Labor Relations Board (Board) continues to regulate the content of campaign speeches made during the thousands of union representation elections held each year.[1] The Board's goal in regulating the campaign speeches is to protect the employees' right to freely choose whether a union will represent them in labor negotiations. The regulations are enforced to ensure that the elections are conducted under "laboratory conditions."[2] However, in pursuit of this goal, the Board has restricted an employer's right to express its views on union representation. Specifically, the Board has established and applied controls that prohibit employers from articulating predictions of substantive adverse consequences of unionization. This comment will examine the development and current status of the Board's restrictive policy concerning employers' predictions. In addition, this article will attempt to demonstrate that the Board's restric-

---

1. The Board conducted 8,198 conclusion representation elections in fiscal 1980, compared with 8,043 such elections a year earlier. The elections involved a total of 458,114 employees. The unions were victorious in 45.7 percent. 45 NLRB ANN. REP. 3, 17 (1980).

2. This goal has often been articulated by the Board. *See, e.g.*, Sewell Mfg. Co., 138 N.L.R.B. 66, 69-70 (1962); General Shoe Corp., 77 N.L.R.B. 124, 125 (1948); NLRB ANN. REP. 60 (1968).

The Board regulates campaigns by setting aside the election when the Board finds valid objections to conduct allegedly affecting the outcome of the election. The Board may set aside an election without finding an unfair labor practice. General Shoe Corp., 77 N.L.R.B. 124, 126 (1948). In addition, if an unfair labor practice is found, the election will be set aside. Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787 (1962). A finding of an unfair labor practice may also result in an order to bargain. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). The remedy imposed is a function of the perceived total impact of the employer's illegal campaign practices. For a succinct summary of the Board's procedures for regulating campaign tactics, see J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 6-11 (1976).

tions are not supported by the National Labor Relations Act (NLRA) or the case law interpreting and applying the NLRA.

II. HISTORICAL OVERVIEW

The National Labor Relations Act (also known as the Wagner Act)[3] was passed in 1935 to protect the right of "employees to organize and bargain collectively through representatives of their own choosing."[4] The key section of the Wagner Act is section 7, which was originally drafted as:

> Employees 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.[5]

Congress provided for enforcement of section 7 by declaring in section 8(a)(1) that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[6]

After adoption of the Wagner Act, the early Board decisions required employers to take a position of strict neutrality towards the union representation elections. The Board based its position upon two major concepts. First, any statement by an employer against union representation coerced employees because of the employer's position of economic power over the employees.[7] Second, the Board held that the employer had no interest in the choice of bargaining repre-

---

3. Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (1935) (currently codified at 29 U.S.C. § 151-69 (1976)).

4. A. COX, D. BOK & R. GORMAN, CASES ON LABOR LAW 73 (9th ed. 1981).

5. 29 U.S.C. § 157 (1976).

6. *Id.* § 158(a)(1).

7. OFFICE OF THE GENERAL COUNSEL NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 292-93 (1974) [hereinafter cited as NLRB OUTLINE]; 3 NLRB Ann. Rep. 125 (1938); Note, *Restrictions on Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 NW. U.L. REV. 40, 43-44 (1968). This position assumes the behavioral truism "free choice cannot be exercised in the face of threat or coercion." Grunewald, *Empiricism in NLRB Election Regulation:* Shopping Kart *and* General Knit *in Retrospect*, 4 IND. REL. L.J. 161, 165 (1982). This view was expressed by the Board in Wheeling-Steel Corp., 1 N.L.R.B. 699, 709 (1936).

sentatives since it was the employees' exclusive concern.[8] Until 1941 the courts generally enforced the Board's absolute restriction on the employer's ability to express its views on union representation.[9]

The shift away from the requirement that employers remain strictly neutral and mute concerning their views toward their employees' union representation began with the Supreme Court's decision in *Thornhill v. Alabama*.[10] There the Court applied the first amendment right to free speech to labor disputes, stating that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[11] The Court of Appeals for the Sixth Circuit immediately enforced the Supreme Court's recognition of an employer's right to free speech in *Midland Steel Products Co. v. NLRB*,[12] where the court held that even though the employees' vote may have been influenced by a letter from the employer which stated that all employees would be treated the same whether or not they joined a union, the letter did not interfere or coerce.[13] Shortly thereafter, the Sixth Circuit extended the employer's right to free speech by recognizing an employer's right to disseminate its views toward union representation.[14]

In 1941 in the landmark case of *NRLB v. Virginia Electric & Power Co.*,[15] the Supreme Court recognized the employer's first amendment right to express its views on union representation of its employees. The Court, in an opinion written by Justice Murphy, held that the Wagner Act does not enjoin "the employer from expressing its view on labor

8. A. COX, D. BOK & R. GORMAN, *supra* note 4, at 141; NLRB OUTLINE, *supra* note 7, at 292-93.

9. *E.g.*, NLRB v. Ford Motor Co., 23 N.L.R.B. 342 (1940), *enforced as modified*, 122 F.2d 414 (8th Cir. 1941); NLRB v. Falk Corp., 102 F.2d 383 (7th Cir. 1939).

10. 310 U.S. 88 (1940).

11. *Id.* at 102.

12. 113 F.2d 800, 804 (6th Cir. 1940).

13. *Id.* The court said that "[u]nless the right of free speech is enjoyed by employers as well as by employees, the guaranty of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person." *Id.*

14. NLRB v. Ford Motor Co., 114 F.2d 905, 913 (6th Cir. 1940).

15. 314 U.S. 469 (1941).

policies or problems, nor is a penalty imposed upon it because of any utterances which it has made."[16] The Court refused to affirm the Board's finding of an unfair labor practice which was based solely on an employer's innocuous statements to its employees.[17]

While it is generally agreed that *Virginia Electric* "abolished the assumption that the employer's position made his expressions in the organizing context coercive per se,"[18] the Court also held that employees are protected by the Act "[i]f the total activities of an employer restrain or coerce his employees in their free choice."[19] The Court's discussion of the totality of the employer's conduct has been interpreted to give the Board broad discretion in evaluating the employer's speech.[20] However, in view of the emphasis the Court placed on the employer's constitutional right to express its views and the severe conduct of Virginia Electric & Power Company, it is clear that flagrant employer interference in the election process could transform protected speech into coercive speech.[21]

In the early 1940's the law controlling employer speech was fairly stable with the Board permitting most employer speech "so long as [the employer] did not imply that he would punish the employees if they chose to organize."[22] In 1947, Congress continued the trend toward a stronger em-

16. *Id.* at 477. The court also stated, "[t]he employer in this case is as free now as ever to take any side it may choose on this controversial issue." *Id.*

17. The employer's statement characterized the previous 15 years as a period during which the company and its employees enjoyed a "happy relationship." It went on to say that the employees were free to submit grievances, and the mutual interest of all could best be promoted through confidence and cooperation. *Id.* at 471-72 n.5.

18. Note, *supra* note 7, at 44. *See* Thomas v. Collins, 323 U.S. 516, 537-38 (1945); NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967).

19. 314 U.S. at 477.

20. Clark Bros. Co., 70 N.L.R.B. 802 (1946); 11 NLRB ANN. REP. 34 (1946); Note, *supra* note 7, at 44-45.

21. Virginia Electric & Power Company was attempting to persuade its employees to form their own internal union as opposed to joining an "outside" union. The company's conduct included surveillance of a rival union meeting, interrogation of employees, threats of discharge for "messing" with the outside union and discharges of four employees for their union activities. On the basis of the conduct, the unfair labor practice charges were eventually upheld. Virginia Elec. & Power Co. v. NLRB, 132 F.2d 390 (4th Cir. 1942), *aff'd*, 319 U.S. 533 (1943).

22. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 74-75 (1964).

ployer right to free speech by passing the Taft-Hartley Amendments.[23] In creating section 8(c),[24] Congress initially considered, but eventually rejected, a provision for the evaluation of the context of an employer's actions to determine whether an employer's speech was coercive.[25] After the Taft-Hartley Amendments, an employer's right to express its views was firmly established and its speech would fall outside of constitutional protection only if the speech or the employer's related conduct clearly coerced employees.[26]

During the 1950's the Board continued the trend started in *Virginia Electric* by giving substantial latitude to employer speeches.[27] During the 1960's, however, the Board[28] "made

---

23. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 158(c) (1973)). For a thorough discussion of the impact of the Taft-Hartley Amendments on employer free speech rights, see Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 15-20 (1947).

24. Section 8(c) states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (1973).

25. *See* H.R. 3020, 80th Cong., 1st Sess., § 8(d)(1) (1947). Senator Taft indicated that the compromise version of section 8(c) limits the extent to which employer conduct can be applied to determine whether its speech is not protected by the constitution:

> The House conferees were of the opinion that the phrase "under all the circumstances" in the Senate amendment was ambiguous and might be susceptible of being construed as approving Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices. Since this was clearly contrary to the intent of the Senate, . . . the Senate conferees acceded to the wish of the House group that the intent of this section be clarified.

93 CONG. REC. 601 (1947).

The Board decision Senator Taft was referring to was Clark Bros. Co., 70 N.L.R.B. 802 (1946), which found otherwise protected employer speech coercive merely because the employees were assembled during working time to hear the speeches. *See* Note, *supra* note 7, at 45 n.21. The limitations for using employer conduct to interpret its speech as coercive were specifically recognized in NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967).

26. Judge Bok states that in section 8(c), Congress applied the same standards normally accorded public debate under the first amendment. Bok, *supra* note 22, at 77.

27. *Id.* at 74-75. *See, e.g.*, Southwester Co., 111 N.L.R.B. 805 (1955); Esquire, Inc., 107 N.L.R.B. 1238 (1954); Silver Knit Hosiery Mills, Inc., 99 N.L.R.B. 422 (1952). However, in 1948 the Board enhanced its power to regulate elections by declaring that it could set aside an election even though the employer was not guilty of a § 8(c) violation. General Shoe Corp., 77 N.L.R.B. 124, 126-27 (1948). *See* A. COX, D. BOK & R. GORMAN, *supra* note 4, at 142, 143; Grunewald, *supra* note 7, at 167.

a serious attempt to prevent abuses by placing more stringent limitations on the employer's power to speak."[29] The swing back from the latitude granted to employer election speeches was based on the practical effect of the former policy which gave "hostile employers great leeway to indulge in dire predictions in order to dissuade the employees from supporting the union."[30]

Although the Board had a valid concern in protecting employees from employers who applied their economic clout to prevent lawful unionization, a review of the Board's decisions indicates that it often overprotected the employees' interests. Judge Bok believes that overprotection actually detracts from the employees' exercise of their free choice because the employees are prevented from having access to relevant information.[31] The Board's efforts to limit an employer's preelection speech were generally supported when employers declared that operations would have to shut down and the employees would lose their jobs if they voted for the union.[32] But other Board decisions that restricted employer speech concerning other allegedly adverse consequences of union representation were criticized and often reversed.[33] During the 1960's, as the Board attempted to limit

---

28. The change in the perspective of the Board was brought about by a change in membership. *See* A. COX, D. BOK & R. GORMAN, *supra* note 4, at 144.

29. Bok, *supra* note 22, at 75.

30. *Id.*

31. *Id.*

32. *Id.* at 77. *See, e.g.*, NLRB v. Yokell, 387 F.2d 751 (2d Cir. 1967); Collins & Aikman Corp., 143 N.L.R.B. 15 (1963).

33. *See* Bok, *supra* note 22, at 76-82. Judge Bok criticizes Lord Baltimore Press, 142 N.L.R.B. 328 (1963) (election set aside because employer stated that it intended to litigate); Oak Mfg. Co., 141 N.L.R.B. 1323 (1963) (election set aside because employer presented information which showed that the employees received higher wages than employees at union plants); Trane Co., 137 N.L.R.B. 1506 (1962) (election set aside because employer stated that the present wage policy was fair and that the union did not have the economic power to compel the employer to change).

In addition, the courts of appeals often refused to enforce the restrictive policy of the Board. The Board was reversed in Bendix Corp. v. NLRB, 400 F.2d 141 (6th Cir. 1968) (statement in a vigorous campaign that wages and benefits could decrease if company forced to bargain with union was not a threat); NLRB v. Uniform Rental Serv., 398 F.2d 812 (6th Cir. 1968) (letter that plant would continue to lose money if the union was elected was not a threat); NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967) (letters to employees concerning various adverse consequences of unionization were not threats).

employee speech, the issue developed as to whether an employer's statements were mere predictions or prophecies, or whether the statements were illegal threats.

III. CREATION OF STANDARDS FOR THE THREAT OR PREDICTION ISSUE

In 1968 the Supreme Court met the prediction or threat issue in *NLRB v. Gissel Packing Co.*[34] That landmark decision, written by Chief Justice Warren, established guidelines the Board and the courts must use in determining whether a statement is a prediction or an illegal threat. In formulating its standards, the Court balanced the employer's right to free speech against "the economic dependence of the employees on their employers"[35] and the resulting tendency of employees to "pick up intended implications . . . that might be more readily dismissed by a more disinterested ear."[36] Chief

---

For a detailed analysis of the cases leading up to *Gissel Packing Co.*, see Comment, *Employer Free Speech: Threats, Opinions, Predictions of Dire Consequences — The Advent of a Clearer Standard*, 18 S.D.L. REV. 441, 448-53 (1973).

34. 395 U.S. 575 (1969). *Gissel* was a consolidation of four cases — three from the Fourth Circuit and one from the First Circuit. The court established the prediction versus threat issue in the case from the First Circuit, NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968). For a discussion of the facts in *Sinclair Co.*, see *infra* note 41.

35. 395 U.S. at 617. The Court did not break new ground by classifying employees as economically dependent on their employers. In 1936 the Board observed that "[t]he employee is sensitive to each subtle expression of hostility upon the part of one whose good will is so vital to him, whose power is so unlimited, whose action is so beyond appeal." Wheeling Steel Corp., 1 N.L.R.B. 699, 709 (1936). In addition, these assumptions are considered implicit in the Wagner Act. *See* S. REP. No. 573, 74th Cong., 1st Sess. 10 (1935); Phalen, *The Demise of* Holywood Ceramics: *Fact and Fantasy*, 46 U. CIN. L. REV. 450 (1977).

However, it can be argued that the Court overstated its case by declaring, in effect, that all employees are economically dependent on their employers. Economic dependence exists in labor relationships only where the employee possesses insufficient marketable skills to enable him or her to find other employment or is tied to the present job by other factors, such as there being no other employer nearby or the employee's reluctance to relocate. Although certain employees are economically dependent on their employers, other employees, particularly employees with a skill or trade, are often not dependent. The Court cited no evidence to support its conclusion that employees are per se dependent on their employers. Nevertheless, several courts have adopted this position. *See* NLRB v. Garry Mfg. Co., 630 F.2d 934, 940 (3d Cir. 1980); Mon River Towing, Inc. v. NLRB, 421 F.2d 1, 9 (3d Cir. 1969). *But see* Midland Nat'l Life Ins. Co., 110 L.R.R.M. (BNA) 1489 (1982) (Board abandoned its "protectionist" role in factual misrepresentation claims).

36. 395 U.S. at 617. This statement is conclusory. The Court cites no evidence to support this position except that the alleged economic dependence causes employees to overreact to employer statements and succumb to a fear that they will lose their

Justice Warren specifically acknowledged the employer's right to free speech but added that the right did not include "communications [that] . . . contain a 'threat of reprisal or force or promise or benefit.' "[37] The Court further noted that the employer may make predictions "as to the precise effects he believes unionization will have on his company," but "the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization."[38] Chief Justice Warren explained the distinction between a threat and a prediction:

> If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.[39]

Some courts of appeals have held that the above principle is a broad restriction on an employer's first amendment right of free speech.[40] However, a close examination of the facts involved in the *Gissel* decision[41] clearly indicates that

---

jobs if they vote the union in. Thus, it can be argued that the Court is saying that employees lose their ability to make a rational decision concerning union representation. The concept that employees' preference for a union is fragile was attacked in a landmark empirical study. *See* J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 2, at 140-41.

37. 395 U.S. at 618.

38. *Id.*

39. *Id.*

40. *See* Rimmer v. Colt Indus. Operating Corp., 656 F.2d 323, 328 (8th Cir. 1981); NLRB v. Associated Gen. Contractors, 633 F.2d 766, 792 n.9 (9th Cir. 1980); Martin Tractor Co. v. Federal Election Comm'n, 627 F.2d 375, 386 (D.C. Cir. 1980).

41. The Supreme Court summarized the facts surrounding the union election at the employer's company:

> During the two or three weeks immediately prior to the election on December 9, the president sent the employees a pamphlet captioned: "Do you want another 13-week strike?" stating, *inter alia*, that: "We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike. . . . The Teamsters Union is a strike happy outfit." Similar communications followed in late November, including one stressing the Teamsters' "hoodlum control." Two days before the election, the Company sent out another pamphlet that was entitled: "Let's Look at the Record," and that pur-

Gissel was not intended to reverse the established precedent recognizing the employer's right to free speech. The president of the defendant employer made statements to his employees which the Board and the Supreme Court interpreted as threats of retaliatory actions for voting for the union. The subject matter of the objectionable statements is critical to understanding the intended impact of *Gissel*. The employer's statements were held to convey the following message:

> [T]hat the "strike-happy" union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such a case would have great difficulty finding employment elsewhere.[42]

Thus *Gissel* clearly involved a case where an employer threatened employees with severe and far-reaching consequences if the union was elected. These consequences included plant closure, with its potential for long-term unemployment. The Court indicated its overriding concern about the threatened plant closure by specifically referring to the prior plant closures[43] when stating the rule that predictions must be based on "objective fact"[44] and must "convey an employer's belief as to demonstrably probable consequences beyond his control."[45]

Clearly, the basis for citing *Gissel* as a broad restriction of employer free speech is suspect. The *Gissel* Court specifi-

---

ported to be an obituary of companies in the Holyoke-Springfield, Massachusetts, area that had allegedly gone out of business because of union demands, eliminating some 3,500 jobs; the first page carried a large cartoon showing the preparation of a grave for the Sinclair Company and other headstones containing the names of other plants allegedly victimized by the unions. Finally, on the day before the election, the president made another personal appeal to his employees to reject the Union. He repeated that the Company's financial condition was precarious; that a possible strike would jeopardize the continued operation of the plant; and that age and lack of education would make reemployment difficult. The Union lost the election 7-6, and then filed both objections to the election and unfair labor practice charges which were consolidated for hearing before the trial examiner.

395 U.S. at 588-89.

42. *Id.* at 619.

43. *Id.* at 618. For a summary of the *Gissel* rule, see *supra* text accompanying notes 38 & 39.

44. 395 U.S. at 618.

45. *Id.*

cally recognized an employer's right to free speech when it said that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board."[46] The decision specifically focused upon the risk of plant closure facing the employees. However, as the following discussion indicates, the Board has extended the *Gissel* test to severely limit an employer's right to free speech during union election campaigns.

IV. APPLICATION OF THE *GISSEL* STANDARD

A. Formulation of the General Rule

Although the Supreme Court in *NLRB v. Gissel Packing Co.*[47] attempted to set guidelines concerning permissible preelection campaign speeches, the result has been an inconsistent and confusing body of regulatory law. The courts of appeals have formulated a fairly consistent statement of the *Gissel* test. The general rule is succinctly stated as follows:

> It is well established law that an employer has the right to express an opinion or predictions of unfavorable consequences which he believes may result from unionization. Such predictions or opinions are not violations of the National Labor Relations Act if they have some reasonable basis in fact and provided that they are in fact predictions or opinions other than veiled threats on the part of the employer to visit retaliatory consequences upon the employees in the event that the union prevails.[48]

The two primary factors the courts consider in applying the *Gissel* test are "the extent to which the prediction is based on demonstrable probabilities; and the extent to which the adverse consequences warned of are within the employer's control."[49] Although the language of the rule seems clear, its application has rendered inconsistent results in cases with similar fact situations. This is somewhat under-

46. 395 U.S. at 617.

47. 395 U.S. 575 (1969).

48. NLRB v. General Tel. Directory Co., 602 F.2d 912, 914-15 (9th Cir. 1979) (citing NLRB v. Lenkurt Elec. Co., 438 F.2d 1102, 1105 (9th Cir. 1971)).

49. NLRB v. Garry Mfg. Co., 630 F.2d 934, 938 (3d Cir. 1980).

standable since determining whether an employer's statement is a veiled threat involves an inherently subjective analysis of the circumstances surrounding the statement,[50] the behavioral assumptions underlying the regulation of union representation elections,[51] and the motivation behind the statement.[52]

However, albeit not without exception, certain patterns have emerged during the twelve-year reign of the *Gissel* guidelines.[53] The Board's initial applications of *Gissel* often resulted in a finding that employer statements regarding likely plant closures were illegal threats. As the 1970's progressed, the Board applied *Gissel* to expand its policy of restricting employer speech. The Board began to prohibit employer statements describing various adverse consequences of union representation. Generally, with some notable exceptions, the circuit courts have been reluctant to interfere with the Board's determinations. As the cases below indicate, the result has been to severely restrict an employer's campaign speech far beyond the threats of plant

---

50. *See* J.P. Stevens & Co. v. NLRB, 638 F.2d 676, 681 (4th Cir. 1980); NLRB v. Laredo Coca Cola Bottling Co., 613 F.2d 1338, 1341 (5th Cir. 1980).

51. The behavioral assumptions underlying the entire spectrum of labor law, especially union representation elections, have been the subject of much discussion and criticism. One commentator concluded that recent empirical studies

> raise[d] doubts about the validity of a number of specific tenets of union election regulation, but also call into question the larger issue of the Board's characteristic practice of relying almost exclusively on unverified behavioral assumptions and the abstract elaboration of legal principles as the skeleton on which to build the body of labor law.

Roomkin & Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441, 1442 (1977). *See* Bok, *supra* note 22, at 46-53, 88-90. *See generally* Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972).

52. For a statement to be defined as coercive, the statement must reflect the speaker's intent to take retaliatory action. In Chauffeurs, Teamsters & Helpers, Local 633 v. NLRB, 509 F.2d 490 (D.C. Cir. 1974), the court of appeals stated:

> [C]oercion must surely be interpreted to mean more than a persuasive argument that certain events will occur which are distasteful *to the listener*. Rather coercion is defined by reference to the will of the speaker — does the speaker intend to perform an act for no other reason than that the listener is in favor of the union?

Id. at 495-96 (emphasis in original). *See also* NLRB v. General Tel. Directory Co., 602 F.2d 912, 918-19 (9th Cir. 1979).

53. *See* R. WILLIAMS, P. JANUS & K. HUHN, PUBLIC POLICY SERIES, INDUSTRIAL RESEARCH UNIT — UNIVERSITY OF PENNSYLVANIA 63-92 (1974) (general discussion of the *Gissel* standard and the early cases applying it).

closure and long-term unemployment which were the facts underlying the *Gissel* decision.

B. Plant Closures

The facts and the legal analysis in *Gissel* clearly indicate that the Court was primarily concerned with employer threats of plant closure. This is reflected in the early decisions which applied *Gissel* to plant closure statements. In *Campbell Chain*[54] the Board set aside an election when it found the employer had conveyed the message that it would close down the plants if the union made exorbitant wage demands. The Board reasoned that such statements had "an obvious potential for interference with the free choice of [the] employees."[55] In *NLRB v. Taber Instruments, Inc.*,[56] the Second Circuit enforced a Board order where the employer statements implied that if the union won the election, certain operations would possibly be transferred to other plants. The court applied the *Gissel* analysis and held that the statements were illegal threats.[57]

The law concerning plant closures remained relatively stable throughout the 1970's and into the 1980's.[58] The stringent restrictions placed on employer predictions of potential future plant closing reflect the widely accepted assumption that:

> if the employees are led to believe that the company will simply close down automatically if the union is selected,

---

54. 180 N.L.R.B. 51 (1969).

55. *Id.* at 52.

56. 421 F.2d 642 (2d Cir. 1970).

57. *Id.* at 644.

58. *See* Weather Tamer, Inc. v. NLRB, 676 F.2d 483 (8th Cir. 1982) (general discussion of the law applicable to employer statements on plant closures). Recent Board decisions finding employer predictions of plant closures objectionable include: Associated Roofing & Sheet Metal Co., 255 N.L.R.B. 1349 (1981) (employer's prediction that unionization would result in loss of jobs because area contractors were antiunion was not supported by any objective facts which demonstrated employer would be "fatally noncompetitive"); Crown Cork & Seal Co., 255 N.L.R.B. 14 (1981) (employer's prediction that unionization would cause closure of plant due to mandatory 30% to 40% increase in wages, leading to expected loss of plant's sole customer, did not have "objective factual basis" because customer's willingness to pay increased costs was not considered); Overnite Trans. Co., 254 N.L.R.B. 132 (1981) (statement of "automatic job loss" due to the predicted closing of marginal terminals did not consider effect of negotiations). *See* Williams, *Distinguishing Protected From Unprotected Campaign Speech*, 33 LAB. L.J. 265, 270-71 nn.21-22 (1982).

> they are left with a devastating and improper assertion which the organizer is unable to rebut save by pointing out that the employer cannot carry out his plan without violating the law.[59]

However, the restrictions on plant closure or transfer statements have been extended to include not only statements threatening plant closure, but also statements describing previous plant closures which may leave the impression that if the union is elected, plant closure will occur again.[60] These decisions seem to ignore Judge Bok's caveat that "it is also important to avoid discovering veiled threats or sinister ambiguities by placing a strained interpretation on the employer's remarks."[61]

---

59. Bok, *supra* note 22, at 77. However, Judge Bok indicates this generally accepted behavioral assumption may not be valid. *See Foreward* to J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY xi-xiii (1976).

60. Thus, employers cannot discuss potential future plant closures unless the decision has already been made. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). The Fifth Circuit articulates this rule as follows: "prediction of plant closure in the event of a union victory constitutes a coercive threat if the statement is 'unaccompanied by a proven causal link to specific union economic demands.' " Chromalloy Am. Corp. v. NLRB, 620 F.2d 1120, 1124 (5th Cir. 1980); NLRB v. Mangurian's, Inc., 566 F.2d 463, 466 (5th Cir. 1978).

In addition, employers must be wary of discussing prior plant closings in the company. One commentator articulated the rule as follows:

> If the purpose of the story is to rebut union claims that it can guarantee job security — and not to lay the blame for the plant closing at the union's door — this should be clearly spelled out. If, on the other hand, the plant closing resulted from economic conditions caused by the union, those economic conditions and the union's causative role should be carefully, truthfully, and *provably* set forth.

Latham, *Employer Campaign Information: Is Truth a Defense?*, 6 EMPLOYEE REL. L.J. 498, 502 (1980-81) (emphasis in original). *See also* Williams, *supra* note 58, at 265-71. *See* TRW-United Greenfield Div. v. NLRB, 637 F.2d 410 (5th Cir. 1981); General Dynamics Corp., 250 N.L.R.B. 719 (1980).

61. Bok, *supra* note 22, at 77. This sentiment was recently expressed by Board Member Hunt in his dissent in Hahn Property Mgmt. Corp., 111 L.R.R.M. (BNA) 1043 (1982). Member Hunt stated that "an appreciation of this Agency's proper role in overseeing representation matters, coupled with a modicum of common sense, compels the conclusions that this Board has no business engaging in a strained and hypertechnical reading of campaign material as a basis for overturning an election." *Id.* at 1044 (Hunt, Member, dissenting).

C. Other Adverse Consequences of Unionization

1. Board Decisions

The decisions of the Board continue a policy developed during the 1960's to restrict the employer's right to free speech.[62] This policy was applied in the Board's 1969 decision in *Boaz Spinning Co.*[63] In that case the employer made two carefully prepared speeches which referred to incidents at other plants where the election of a union coincided with a disruption of traditionally friendly employment relations and the plant's inability to effectively compete in the marketplace. The Board found that the speeches contained "less than subtle suggestions that the employees were better off without a union than with one."[64] The Board then decided the employer's free speech rights did not protect those speeches, basing its decision on the grounds that the speeches instilled fear of collective bargaining in the employees and that they indicated that union representation was "a complete excursion into futility."[65]

The further development of the Board's restriction on employer free speech during the 1970's is illustrated by comparing its decisions in *Essex International, Inc.*[66] and *Super Thrift Markets, Inc.*[67] *Essex* involved a 1974 case where the Board found that the employer told an employee "that her recent transfer from a job involving close and frequent contact with fellow employees to a job with less personal contact was due to her [pro]union views and activities."[68] The Board did not find that the statement contained a threat of a change in working conditions due to union support. Rather, the Board ruled that this statement, along with another statement which implied a promise of improved working condi-

---

62. *See supra* text accompanying notes 28-30.

63. 177 N.L.R.B. 788 (1969), *enforcement denied*, 439 F.2d 876 (8th Cir. 1971).

64. *Id.* at 789. It is difficult to imagine a more appropriate message an employer would want to convey during a union representation campaign.

65. *Id.* at 789-90. Subsequently, the Sixth Circuit reversed the Board, citing its long-standing recognition of employers' rights to free speech as its reason for applying the *Gissel* test narrowly. Boaz Spinning Co. v. NLRB, 439 F.2d 876, 877-78 (6th Cir. 1971). For a further discussion of the court's decision in *Boaz* and other Sixth Circuit decisions, see *infra* text accompanying notes 106-07.

66. 216 N.L.R.B. 831 (1975).

67. 233 N.L.R.B. 409 (1977).

68. *Essex Int'l, Inc.*, 216 N.L.R.B. at 831.

tions, did not have an impact on the election. The Board noted that these statements were made to only "2 employees out of a unit of 325."[69]

However, nearly three years later in *Super Thrift Markets, Inc.*,[70] the Board came to a different conclusion concerning a conversation from which it was difficult to infer a threat of adverse consequences. In that case a supervisor stated to an employee while on break, "[p]oor Sherry [another employee], she's out there working on the register all alone." The employee replied, "Well what about me . . . I work hard out there too." The supervisor answered, "[W]ell [Sherry is] a good girl . . . because she's not for the Union."[71] The Board determined that this conversation implied a threatened change in working conditions in that the supervisor's "appraisal of his employees' work would be affected by whether they were for or against the Union"[72] and as such was a coercive threat. The Board appears to have given the above language an exceedingly strained interpretation to find that the employer coercively threatened the employee.

These decisions indicate that the Board will find employer statements objectionable even though the statements clearly satisfy the traditional *Gissel* standards which measure whether the statements are true and based on demonstrably probable consequences. This attitude is evident in recent Board decisions. For example, in *General Dynamics Corp.*[73] an employer made several entirely truthful statements during a union election campaign. The employer informed its employees of its prior experiences with collective bargaining. These experiences included defeats for the union in eleven out of fourteen previous elections held at company plants and long delays in the bargaining process, during which wages were frozen. The employer also explained that the

69. *Id.* However, the election was decided by only four votes, 145 to 149.

70. Super Thrift Markets, Inc., 233 N.L.R.B. 409 (1977).

71. *Id.* at 409. *But see* Brooks Bros., 110 L.R.R.M. (BNA) 1127 (1982) (Board appeared to consider the truth of an employer's statement that "there was no guarantee of higher commission rates" in ruling that statement was not coercive threat).

72. Super Thrift Markets, Inc., 233 N.L.R.B. at 409.

73. 250 N.L.R.B. 719 (1980). One commentator described the Board's decision in the case as an "aberration." Latham, *supra* note 60, at 498-502.

union might ask for concessions which would strengthen the union's own position at the expense of the employees. The employer recounted previous long and violent strikes at other of its organized plants, and noted that violence and strikes are a possibility when there is a union present.[74] The Board set aside the election[75] based on the perceived coercive impact of the employer's statements considered as a whole. The Board ruled:

> The Employer's numerous references to strikes, violence, loss of business [sic] loss of jobs, and loss of benefits amounted to veiled threats and created an atmosphere of fear. In the context of these specific threats, the Employer's repeated statements associating the Petitioner with strikes, plant closures, and job loss had a coercive impact on the employees.[76]

The problem with the Board's decision is that the Board did not analyze the statements under the *Gissel* test, but instead merely concluded that the statements constituted veiled threats.[77] Moreover, the Board did not consider the truthfulness of the statements.[78] Although truth is not an absolute defense, the Board gave no indication that any of the statements were intended to convey the impression that the employer would take retaliatory actions against the employees if the union was elected. Thus, the Board appears to have expanded its definition of what constitutes a threat to include any statement of adverse consequences, regardless of

---

74. 250 N.L.R.B. at 719-22. The employer also made statements concerning prior plant closings and transfers. The analysis here primarily concerns the other objectionable employer statements. See *supra* text accompanying notes 62-63, for analysis of the plant closure issue.

75. The election was set aside even though the union was defeated by a substantial margin. The vote was 272 to 203 against the union. *Id.* at 719.

76. *Id.* at 722.

77. *See* Latham, *supra* note 60, at 500-02. The author points out that all of the statements were true or demonstrably probable; that is, the election losses did occur, the long delays and wage freezes did occur and are not uncommon during initial bargaining sessions, unions are known to bargain for self-preserving contract provisions, the past violent strikes did occur, and a strike is a distinct possibility whenever a union is present.

78. In addition, the Board discounted any impact of the employer's disclaimers that the statements were not threats to close the plant or reduce wages. General Dynamics Corp., 250 N.L.R.B. 719, 723 (1980). *See* Latham, *supra* note 60, at 501.

whether it carries the threat of adverse action by the employer.[79]

In *McGraw Edison Co.*[80] the Board again refused to consider the truthfulness of an employer's statement. In that case the employer told its employees that if a rival union won the election, sales would fall because union electricians would refuse to install the company's lighting fixtures products because the products were not manufactured by union members. The employer pointed out that this exact situation had occurred twenty-five years earlier when sales fell because electricians refused to install company products which did not include the union's label. In addition, the employer demonstrated that it is a regular practice of the industry to verify that the fixtures are made by the union.[81]

The Board disregarded the prior incident since it occurred twenty-five years ago and simply refused to accept the evidence of the industry practices,[82] although no contrary evidence was introduced. The Board held that the employer's predictions "posed a threat to the very livelihood of the employees."[83] Thus, even though the employer's statements satisfied *Gissel* in that they were true and based on unrebutted "demonstrably probable" evidence, the Board held them objectionable.

Another recent case which clearly exposes the Board's policy of restricting employer speech by construing reasonable predictions as coercive threats is *International Harvester Co.*[84] The dispute involved the employer's prediction that if the union were elected, the employees would lose their savings and investment program (SIP)[85] and their promotional

79. *See supra* note 52. *See also* Latham, *supra* note 60, at 502.

80. 259 N.L.R.B. 702 (1981).

81. *Id.* at 703.

82. *Id.*

83. *Id.*

84. 258 N.L.R.B. 1162 (1981).

85. *Id.* at 1163 (Zimmerman, Member, dissenting). SIP is an attractive program. In SIP, participating employees allow the company to deduct a portion of their pay; the company "in turn matches the deduction with its own funds and invests the total on behalf of the employees." It is reasonable to conclude that if employees faced the possibility of losing their interests in SIP in the event of representation they would want to be aware of that possibility.

opportunities. The Board found the employer's statements were illegal threats and ordered a new election.[86]

The Board noted that on several occasions the employer stated that the employees would lose their SIP if they voted for the union. The basis for the employer's statement was the fact that the company had a national contract with the union that was campaigning for election. The national contract, which automatically applied to all newly-elected units, did not have a SIP provision. When the contract was applicable, the SIP would automatically be discontinued. The employer pointed out that although the SIP is negotiable, no other organized plant had been able to retain its eligibility for participation in SIP.[87]

The Board determined that the employer, by informing its employees of the loss of SIP, had threatened the employees. The majority reasoned that since SIP was subject to negotiations, it was within the employer's control, and thus a threat.[88] This reasoning by the majority extends the *Gissel* test to such an extent as to render it a nullity. Any change in working conditions is theoretically within an employer's control. The employer could unilaterally agree to maintain or adopt any existing wage, benefit or other working condition desired by the union. Thus, as dissenting Board Member Zimmerman pointed out, the majority's application of the *Gissel* rule would effectively prevent employers from making any prediction of adverse consequences of unionization, because only "inevitable consequences" could be discussed.[89] The majority's analysis thus extended *Gissel* far beyond its narrow factual situation.

---

86. *Id.* at 1162 n.1. The first election was held in February, 1980; the union lost 44 to 112. Even though a new election was held in October, 1981, the outcome was the same, with the union losing 26 to 64.

87. *Id.* at 1163 (Zimmerman, Member, dissenting).

88. *Id.* at 1162 n.3.

89. *Id.* at 1164 (Zimmerman, Member, dissenting). Any prediction involves inherent uncertainty; otherwise it is not a prediction but a statement of fact. A matter subject to collective bargaining is clearly not a certainty. Thus, limiting an employer to making predictions that are inevitable, effectively prohibits employers from making any predictions at all.

The *International Harvester* majority equated "demonstrably probable consequences," (*See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969)), with "inevitable." Clearly this was not intended by the Wagner Act or the Supreme Court. *See* International Harvester Co., 258 N.L.R.B. 1162 (1981) (dissenting opinion).

The second area of dispute in *International Harvester* concerned the employer's prediction of a loss of promotional opportunities. The employer's statements were based on the fact that the national contract limited employees' seniority rights to their own units. Consequently, the unit employees, if organized, would have no contractual seniority rights in other organized and nonorganized units.[90] The employer stated that if the union were elected the company would not have a contractual obligation to recognize an employee's organized unit seniority in evaluating transfer applications to fill nonorganized jobs. The Board found that those statements were coercive threats.[91] It appears that the majority concluded that since the contract did not specifically prohibit the employer from recognizing organized unit seniority, the employer controlled the seniority bidding policy.

The dissent pointed out that the employer's statement concerning the organized employees' lack of contractual rights to bid their unit seniority for nonorganized jobs was completely accurate. The key distinction was that while organized employees could still apply for jobs in nonorganized units, the national contract did not grant the organized employees any seniority rights for such transfers.[92] Thus, the clerical employees who formerly were able to bid their seniority for other nonorganized jobs under company policy would lose that ability if their clerical unit organized. The dissent concluded that the employer's comments were "reasonable, objective predictions of probable adverse conse-

---

90. This dispute arose because the clerical group attempting to organize was formerly able to bid its seniority for technical group jobs. Since the technical group was not attempting to organize, the clerical employees began to question the future status of their present seniority rights if the union were elected. International Harvester Co., 258 N.L.R.B. at 1165.

91. However, the company also noted that it would continue to accept requests for transfers from organized units to nonorganized jobs, but that there would be no seniority rights in the event of unionization. *Id.* at 1165-66.

92. The employer argued that:

> [S]eniority for bidding to promotions to non-unit jobs is not a subject for negotiation. If the union sought to extend seniority rights beyond the certified unit, it could violate the Section 7 rights of employees outside the bargaining unit to refrain from union activity, and would unlawfully benefit represented employees by granting union represented employees additional rights in these non-unit jobs.

Brief of International Harvester Co. at 14-15, International Harvester Co., 258 N.L.R.B. 1162 (1981).

quences, and not threats of retaliation."[93] Since management could not control the seniority rights of organized employees and its statements were accurate, the Board misapplied the *Gissel* test. These cases seem to indicate that the Board will find objectionable virtually any statement that is adverse to the union.

2. Circuit Courts of Appeals

The recent Board decisions indicate that the Board has severely restricted the employer's right to free speech in union election campaigns. However, the circuit courts of appeals have generally been reluctant to prohibit the Board from implementing its restrictive policy. Generally, some circuits seem to support the Board's restrictive policy, while others perform only a limited review of the Board's decision.

In *NRLB v. Garry Manufacturing Co.*[94] the Third Circuit Court of Appeals found that the employer's statements that the union would make unreasonable demands were threats of "adverse consequences of unionism per se."[95] The court affirmed the Board's decision even though union handouts compared current employee wages to substantially higher average wages in other industries. The court concluded that since the employer indicated it would not give in to the union's unreasonable demands, it evidenced a willingness to strike. Like recent Board decisions,[96] the court's decision focused on the employer's perceived ability to "control" working conditions, such as wages, that were subject to future negotiations.[97]

The circuit courts often fail to thoroughly analyze the Board's application of the law. This is evident from the broad deference usually given to the discretion of the Board. For example, where the Board finds an implied threat, the court will not upset that finding if it is supported by substantial evidence on the record as a whole. Citing *Universal*

93. 258 N.L.R.B. at 1166.

94. 630 F.2d 934 (3d Cir. 1980).

95. *Id.* at 938-40.

96. *See* McGraw Edison Co., 259 N.L.R.B. 702, 703 (1981); International Harvester Co., 258 N.L.R.B. 1162 n.3 (1981).

97. If an employer has the ability to absolutely "control" the working conditions that are subject to negotiation, the negotiations have no purpose.

Camera Corp. v. NLRB,[98] the courts consider it improper to "displace the Board's choice between two fairly conflicting views [of the facts], even though the court would justifiably have made a different choice had the matter been before it *de novo*."[99] In addition, courts often state that "[c]redibility resolutions are peculiarly within the province of the trial examiner and the National Labor Relations Board and are entitled to affirmance unless inherently unreasonable or self-contradictory."[100] Finally, the courts apply a general standard of review which holds that the Board's finding of a section 8(a)(1) violation should be upheld when "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or to intimidate employees in the exercise of rights protected under the Act."[101]

The insulation the above standards give to Board decisions generally protects them from the probing analysis they appear to require. Despite those standards, however, the Sixth Circuit subjects Board decisions to probing judicial analysis.[102] In *NLRB v. Hobart Brothers Co.*[103] the Sixth Circuit refused to enforce the Board's finding of a threat in the employer's warnings of possible disclosure by the union of employees who signed union cards. The court held that the *Universal Camera Corp.* test "actually was aimed at reminding Courts of Appeals that they cannot abdicate the judicial function in scrutinizing Board decisions."[104] The court determined that it, not the Board, had special expertise in "construing and interpreting written instruments."[105] Moreover, in *Hobart Brothers* the Sixth Circuit laid the founda-

98. 340 U.S. 474 (1951). *See* Sioux Prods., Inc. v. NLRB, 684 F.2d 1251, 1253 (7th Cir. 1982); Weather Tamer, Inc. v. NLRB, 676 F.2d 483, 487 (11th Cir. 1982); Central Freight Lines, Inc. v. NLRB, 666 F.2d 238, 239 (5th Cir. 1982); NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359 (9th Cir. 1981); NLRB v. Garry Mfg. Co., 630 F.2d 934, 937 (3d Cir. 1980).

99. 340 U.S. at 488.

100. NLRB v. Proler Int'l Corp., 635 F.2d 351, 355 (5th Cir. 1981). *See also* NLRB v. Chester Valley, Inc., 652 F.2d 263, 269 (2d Cir. 1981).

101. NLRB v. Garry Mfg. Co., 630 F.2d 934, 937 (3d Cir. 1980). *See also* Local 542, Int'l Union of Operating Eng'rs v. NLRB, 328 F.2d 850, 852-53 (3d Cir. 1964).

102. *See, e.g.*, Midland Steel Prods. Co. v. NLRB, 113 F.2d 800 (6th Cir. 1940).

103. 372 F.2d 203 (6th Cir. 1967).

104. *Id.* at 206. *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

105. 372 F.2d at 206.

tion for judicial interference with the Board's policy of restricting employer speech. The court stated, "[t]he employer's constitutional right of free speech, also guaranteed under Section 8(c), should not be so easily restricted."[106] In *Boaz Spinning Co. v. NLRB*[107] the Sixth Circuit refused to acquiesce in the Board's application of *Gissel* to prevent employers from demonstrating adverse consequences of unionism, such as plant closures, strikes, loss of jobs, when the statements reflected events that actually occurred. The court cited its long-held position that "the right of free speech in a union organizational campaign is not to be narrowly restricted."[108]

The Sixth Circuit recently reaffirmed its position on an employer's right to free speech in *NLRB v. Fisher Cheese Co.*[109] The court refused to enforce a Board finding that a letter warning employees that the union may disclose the identities of employees who signed authorization cards was not a coercive threat.[110] The court did not agree with the Board's apparent position that *Gissel* warranted a finding of a "veiled threat of economic retaliation."[111] The court did not construe *Gissel* as a restriction on employers' rights to free speech which would require a reversal of their liberal free speech position. Thus, the Sixth Circuit maintained its position that Board decisions applying constitutional law will be thoroughly reviewed and employers' free speech rights will not be narrowly construed.

While the Sixth Circuit has traditionally recognized an employer's right to free speech, other circuits have only oc-

---

106. *Id.* The court felt that it was up to the parties in the campaign to rebut any claim which they found inaccurate or misleading.

107. 439 F.2d 876 (6th Cir. 1971), *denying enforcement of* 117 N.L.R.B. 788 (1969). See *supra* text accompanying notes 63-65, for a discussion of the Board's decision.

108. 439 F.2d at 878. *See also* Surprenant Mfg. Co. v. NLRB, 341 F.2d 756 (6th Cir. 1965).

109. 652 F.2d 607 (6th Cir. 1980), *denying enforcement of* 238 N.L.R.B. 626 (1978).

110. 652 F.2d at 608-09.

111. *Id.* The court chided the Board for disregarding the court's prior decision in NLRB v. Hobart Bros. Co., 372 F.2d 203 (6th Cir. 1967), which held that a nearly identical statement by an employer was permissible. The court also noted that the Board relied on its own prior decision in *Sparton Mfg. Co.* which had been overruled by the Seventh Circuit. NLRB v. Sparton Mfg. Co., 150 N.L.R.B. 948 (1965), *enforcement denied*, 355 F.2d 523 (7th Cir. 1966).

casionally recognized a similar employer right. For example, in *NLRB v. Lenkurt Electric Co.*,[112] the employer made statements about potential adverse consequences of unionization such as stricter working rules, more difficult working conditions, lower fringe benefits and loss of employee flexibility for intercompany transfers, which were all based on prior company experiences. The Ninth Circuit reversed the Board and held that an employer could make "predictions of possible disadvantages which might arise from economic necessity or because of union demands or union policies."[113] The court applied a narrow construction of an illegal threat in stating that a threat is a statement which "indicate[s] that [the employer] will, of his own volition and for his own reasons, inflict adverse consequences upon his employees if the union is chosen."[114] The court concluded that a liberal right to employer free speech benefits the employee in that it promotes a complete exchange of views which enables employees to make informed and reasoned choices.[115]

More recently, in *NLRB v. Eastern Smelting & Refining Corp.*,[116] the First Circuit upheld the employer's right to free speech. In that case the Board found an implied threat where the employer told its employees that fourteen years earlier a strike had occurred and several employees consequently lost their jobs. The First Circuit implied that the Board determined the statement was a threat merely because it was distasteful. The court pointed out that the Board's conclusion was not supported by analysis or discussion and stated that "[t]o state [past events as simple fact] cannot be condemned by the process of calling it a threat; the employer is not restricted to pleasant facts."[117] Thus, unlike the Board, the First Circuit considers the truth of the employer's statement an important factor in determining whether the statement is a threat.[118] Moreover, the court held that *Gissel* was

112. 438 F.2d 1102 (9th Cir. 1971).
113. *Id.* at 1107.
114. *Id.* at 1106.
115. *Id.* at 1108.
116. 598 F.2d 666 (1st Cir. 1979).
117. *Id.* at 672.
118. *See* Latham, *supra* note 60.

not a broad restriction of an employer's right to free speech; rather, *Gissel* applied to statements that portray an "exaggerated effect"[119] of adverse consequences of unionization.

Another case in which a court of appeals refused to enforce the Board's order to bargain which resulted from objectionable employer predictions of adverse consequences of unionization is *Patsy Bee, Inc. v. NLRB*.[120] There the company president told his employees that two major customers would refuse to do business with Patsy Bee if the employees elected the union. The president's statements were based upon remarks made by a representative of one of the customers, the current precarious financial condition of the company and the president's prior experience at other plants.[121] The court applied the *Gissel* analysis and refused to enforce the Board's order. The court ruled that the president's statement represented " 'economic consequences reasonably forseeable as a result of predictable responses of key customers.' On the whole, the statements reflected his belief based upon objective facts, that unionization could have an adverse economic impact on Patsy Bee."[122] The decision supports the basic right of an employer to freely express reasonable predictions of adverse consequences of unionization during union representation campaigns.

V. EMPIRICAL CHALLENGE

The preceding analysis demonstrates that many of the Board's determinations that employers' speeches constitute actual or implied threats are made without any objective analysis or are supported by a misapplication of the *Gissel* test. In this manner, the Board has been able to further its policy of broadly restricting the employer's right to free speech. The Board's policy is based on the assumption that

---

119. Eastern Smelting & Ref. Corp., 598 F.2d at 672. An example of an "exaggerated effect" is an employer's statement that "employees lacking proper immigration documents would be either fired or picked up by immigration authorities if the union won the election." Sioux Prods., Inc. v. NLRB, 684 F.2d 1251, 1255 (7th Cir. 1982). There the court properly found that the employer's statement violated section 8(a)(1) of the NLRA, using the *Gissel* test. *Id.*

120. 654 F.2d 515 (8th Cir. 1981).

121. *Id.* at 517.

122. *Id.* at 517-18 (quoting the administrative law judge).

employees will interpret ambiguous statements by their employer as threats or reprisals. This assumption embodies the perceived economic dependence of the employee on the employer. Moreover, the Board's decisions assume that employee preferences can be easily shattered by campaign threats, promises or misrepresentations. These assumptions have not been challenged in the courts because of the courts' deference to the Board's expertise in determining which campaign speeches tend to interfere with an employee's free choice.[123]

However, not only is the Board misapplying the law, but its behavioral assumptions underlying its regulations of union representation elections also have been severely questioned.[124] In 1964 Judge Bok was one of the initial commentators to note that the Board's behavioral assumptions were not supported by empirical evidence and that there was a need for empirical data regarding factors influencing employee voting.[125] Twelve years later, Professors Getman, Goldberg and Herman completed an exhaustive empirical study of union representation elections.[126] The purpose of the study "was to determine whether unlawful campaigning has a greater effect on voters than does lawful campaigning."[127] The study consisted of interviewing employee-voters before and after thirty-one representation elections which were expected to be vigorously contested.[128] The authors determined that unfair labor practices had been committed in twenty-two of the elections.[129] However, the study found that ninety percent of the voters had a firm intent to vote for

123. NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (1969); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 479 (1941). *See also* NLRB v. Garry Mfg. Co., 630 F.2d 934, 938 (3d Cir. 1980); Oshman's Sporting Goods, Inc. v. NLRB, 586 F.2d 699, 702 (9th Cir. 1978).

124. *See* Bok, *supra* note 22, at 42, 45, 73-74; Grunewald, *supra* note 7, at 193-94.

125. Bok, *supra* note 22, at 40.

126. J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 2. *See also* Field & Field, ". . . And Women Must Weep" v. "Anatomy of a Lie": *An Empirical Assessment of Two Labor Relations Propoganda Films*, 1 PEPPERDINE L. REV. 21 (1973); Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. REV. 209 (1963).

127. Goldberg, Getman & Brett, *Union Representation Elections: Law and Reality: The Authors Respond to the Critics*, 79 U. MICH. L. REV. 564, 567 (1981).

128. *See* J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 2, at 22-53 (discussion of the methodology of the study).

129. *Id.* at 111-13.

or against the union at the time the campaign began. Moreover, of those, eighty-seven percent voted in accordance with their precampaign disposition despite frequent unlawful campaigning.[130]

The inescapable conclusion of the Getman, Goldberg and Herman study is that an employee's vote is not significantly affected by the content of the campaign. The authors noted that "[s]ince union supporters are not coerced by threats of reprisal . . . into voting against a union representation, threats . . . should [not] be a basis for setting aside an election or finding an unfair labor practice."[131] The authors recommended an end to regulation of any employer conduct or speech, including express and implied threats, during a representation election.[132] Such a conclusion is significant because it undercuts a body of regulatory law which has developed over several decades. Not surprisingly, the study has met with resistance from the Board.[133]

The Board has not applied the Getman, Goldberg and Herman study to the threat-prediction issue. However, the Board did adopt the conclusions of the study in refusing to overturn an election because of a claim of factual misrepresentation in *Shopping Kart Food Market, Inc.*[134] Twenty

---

130. The authors summarized the results of their study in Goldberg, Getman & Brett, *supra* note 127, at 569.

131. J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 2, at 147.

132. *Id.* at 147-48, 150.

133. The Board may have anticipated the results of the Getman, Goldberg & Herman study: the Board forced the authors to go to court to obtain access to needed information. *See* Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971).

134. 228 N.L.R.B. 1311 (1977). In *Shopping Kart* the majority determined that elections would no longer be set aside on account of misleading campaign statements unless the employer had engaged in deceptive campaign practices such as forgery. The Board noted that the ill effects of the rule requiring truth and accuracy in campaign statements include "extensive analysis of campaign propaganda, a restriction of free speech, variance in application as between the Board and the courts, increased litigation, and a resulting decrease in the finality of election results." *Id.* at 1312. The Board relied on the Getman, Goldberg and Herman study's conclusion that the content of campaign speeches has little effect on the employee's vote. *Id.* at 1313 (citing Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263, 276-79 (1976)). The Board said that its rules "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." *Shopping Kart*, 228 N.L.R.B. at 1313. *See* A. COX, D. BOK & R. GORMAN, *supra* note 4, at 159-61.

months later, however, the Board reversed itself in *General Knit, Inc.*[135] The Board's application of the Getman, Goldberg and Herman study in *General Knit* received sharp criticism.[136]

Elsewhere, the response to the Getman, Goldberg and Herman study has been uneven. The judicial reaction appears to have been limited.[137] Congress has given the Getman, Goldberg and Herman study a more positive response.[138] Congress considered the study in debating provisions of the proposed Labor Reform Act of 1977, which would have reduced the Board's regulation of campaign speech.[139] However, the Labor Reform Act was never enacted.[140] The academic response has been extensive and generally favorable.[141]

Although the Getman, Goldberg and Herman study may not provide a complete framework for revising the law regu-

---

135. 239 N.L.R.B. 619 (1978). The Board cited the Getman, Goldberg and Herman study, *supra* note 2, for the proposition that false statements may have a substantial impact on the 19% of the voters who had not clearly decided on their vote prior to the campaign. 239 N.L.R.B. at 621-22. The Board also indicated that the size of the study's sample (31 elections) was not sufficient to support a massive restructuring of regulatory law. *Id.*

136. See the dissenting opinion of Member Penello in General Knit, Inc., 239 N.L.R.B. 619, 624-36 (1978). *See also* Grunewald, *supra* note 7, at 183-84; Goldberg, Getman & Brett, *supra* note 126, at 574-80.

Amazingly, the Board in its recent decision in Midland Nat'l Life Ins. Co., 110 L.R.R.M. (BNA) 1489 (1982), reversed itself for the second time on the factual misrepresentation issue. The Board returned to the *Shopping Kart* standard and now "will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is." 110 L.R.R.M. (BNA) at 1494. Surprisingly, although the Board appeared to readopt the conclusions of the Getman, Goldberg and Herman study cited in *Shopping Kart*, the Board failed to mention the study in the opinion.

137. *See* Oshman's Sporting Goods, Inc. v. NLRB, 586 F.2d 699, 702 (9th Cir. 1978) (study held to cast doubts on the Board's standards, but court deferred to the Board's expertise). *See also* Goldberg, Getman & Brett, *supra* note 127, at 565-80.

138. *See* Goldberg, Getman & Brett, *supra* note 127, at 566.

139. *See* REPORT OF COMMITTEE ON EDUCATION AND LABOR ON H.R. REP. NO. 95-637, 95th Cong., 1st Sess. at 29, 24-35, 38-39 (1977); REPORT OF COMMITTEE ON HUMAN RESOURCES ON S. 2467, S. REP. NO. 411-22, 95th Cong., 1st Sess. 11.22, 2324 (1977).

140. The law was killed by a filibuster in the Senate. *See* Mills, *Flawed Victory in Labor Reform*, HARV. BUS. REV. May-June 1979, at 92-102.

141. *See* Carn, *Union Representation Elections: Law and Reality*, 31 ARK. L. REV. 165 (1977); Goldberg, Getman & Brett, *supra* note 127, at 566-67 & nn.16-24, 580-93; Henry, *Journey into the Future — Role of Empirical Evidence in Developing Labor Law*, 1981 U. ILL. L. REV. 1.

lating campaign speeches, especially regulation of "threats," it clearly provides direction. The study's conclusion that employees are not significantly affected by any employer speech certainly does not warrant the Board's expansive restriction of employer speech. Moreover, the study may support a complete deregulation of campaign speechmaking.[142] What is clearly needed is more scholarly research[143] so that the Board can apply science toward its goal of obtaining elections under "laboratory conditions."[144]

VI. RECENT DEVELOPMENTS

The goal of this comment is to point out the excessive restrictions the Board has placed on employer campaign speeches and the need for reducing its interference in union elections. As discussed above,[145] the Board recently took a significant step toward this end.

In *Midland National Life Insurance Co.*[146] the Board refused to overturn an election solely because of the employer's misrepresentations.[147] Prior to *Midland* the Board applied the policy of actively reviewing misrepresentation claims which had arisen since *General Knit, Inc.*[148] In *Gen-*

142. Instead of regulating campaign speech, the authors of the study would have the Board provide "injunctive relief to obtain reinstatement of discharged employees, treble damages for lost earnings and lost government contracts wherever an employer has taken retaliatory action." *See* J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 2, at 159-63. The key advantage of the proposal is that the remedies could be imposed in much less time than the present objection of an unfair labor practice procedure requires. The present procedures often take close to two years to complete. International Harvester Co., 258 N.L.R.B. 1162 (1981) (17 months); General Knit, Inc., 239 N.L.R.B. 619 (1978) (22 months).

143. One article suggests the Board should conduct its own research and analysis of behavioral studies to aid in formulating regulatory policy. Roomkin & Abrams, *supra* note 51, at 1459-74. *See also* Grunewald, *supra* note 7, at 185-95 (analysis of the Roomkin & Abrams proposal).

144. The Board first articulated its desire to conduct union representation elections under "laboratory conditions" in General Shoe Corp., 77 N.L.R.B. 124, 126 (1948). *See also* Sewell Mfg. Co., 138 N.L.R.B. 66, 69-70 (1962).

145. *See supra* note 134 and accompanying text.

146. 110 L.R.R.M. (BNA) 1489 (1982).

147. In *Midland* the misrepresentations involved the union's prior performance record and the amount the union spent on its members' and union officers' salaries. 110 L.R.R.M. (BNA) at 1489-90.

148. 239 N.L.R.B. 619 (1978). Board decisions concerning the factual misrepre-

eral Knit[149] the Board decided to return to the *Hollywood Ceramics Co.*[150] standard to review alleged factual misrepresentations for any significant or material impact the misrepresentation may have had on the election. The Board increased its review "in order to maintain the integrity of Board elections and thereby protect employee free choice."[151]

In *Midland* the Board returned to its policy of limited review that was the basis of its decision in *Shopping Kart Food Market, Inc.*[152] Under the new rule the Board "will no longer probe into the truth or falsity of the parties' campaign statements, and . . . will not set aside elections on the basis of misleading campaign statements."[153] The Board further stated that it will set aside an election only where the misrepresentation was made in such a deceptive manner that "employees [were] unable to evaluate the forgery for what it was."[154]

Although the Board's new standard of limited review specifically involves the factual misrepresentation issue, the rationale utilized by the Board supports less interference in elections where claims of illegal threats or predictions are

---

sentation issue have been volatile. The factual misrepresentation issue arose in Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962). There the Board held that an election would be set aside where the misrepresentation was substantial and the other party was unable to make an effective reply. Fifteen years later in Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311 (1977), the Board decided no longer to examine the truth or falsity of campaign statements and to set aside an election only if a party had engaged in deceptive campaign practices such as forgery. However, 20 months later, in *General Knit, Inc.*, the Board returned to the protectionist role set forth in *Hollywood Ceramics*. From 1978 until the *Midland* decision, the Board actively reviewed misrepresentations to determine whether the misrepresentations had a material impact on the election at issue.

149. 239 N.L.R.B. 619 (1978).

150. 140 N.L.R.B. 221 (1962).

151. *General Knit*, 239 N.L.R.B. at 620.

152. 228 N.L.R.B. 1311 (1977).

153. *Midland*, 110 L.R.R.M. (BNA) at 1494.

154. *Id.* at 1494. The Board recently applied the *Midland* rule in Raddison Muehlebach Hotel, 111 L.R.R.M. (BNA) 1681 (1982). In *Raddison* the company objected to alleged misrepresentations concerning loss of certain negotiated wage increases if employees voted against the union. The Board interpreted *Midland* to have announced the end of Board "probe[s] into the truth or falsity of campaign statements." 111 L.R.R.M. (BNA) at 1682. The Board concluded that since the employer's objections alleged "nothing more than misrepresentations of fact," the objections were overruled. *Id.* at 1682-83.

made. In *Midland* the Board found the *Hollywood Ceramics* rule resulted in protracted litigation and constant conflict between the Board and the courts of appeals. The Board further stated that "in addition to finding the *Hollywood Ceramics* rule to be unwieldy and counter productive, we also consider it to have an unrealistic view of the ability of voters to assess misleading campaign propaganda."[155] The Board recognized employees' ability to independently analyze campaign information when it stated: "We believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."[156]

Likewise, less Board interference in elections when an employer articulates adverse consequences of unionization would eliminate the same delay and waste of resources caused by overturned elections. In addition, a relaxed standard would also promote "uniformity in national labor law by minimizing the basis for disagreement between the Board and the courts of appeals."[157] Moreover, the standard would recognize the modern view of employees as capable of making independent decisions concerning unionization. This view is clearly supported by the empirical study of Professors Getman, Goldberg and Herman.[158]

Thus, the same rationale used by the Board in *Midland* calls for a similar policy of less Board interference in elections where an employer has articulated potential adverse consequences of unionization. The goals of increased administrative efficiency and a uniform national labor law would be furthered. In addition, a reduced standard would apply modern behavioral assumptions to Board decisions. Although the Board stated that it would "continue to protect against other campaign conduct such as threats . . . which interfere with employee free choice,"[159] the groundwork has

155. *Id.* (citing Shopping Kart Food Mart, Inc., 228 N.L.R.B. at 1313 (1977)).

156. *Id.*

157. *Midland*, 110 L.R.R.M. (BNA) at 1493. For a discussion of the courts of appeals' reviews of Board decisions on the prediction-threat issue, see *supra* text accompanying notes 94-122.

158. For a discussion of the Getman, Goldberg and Herman study, see *supra* text accompanying notes 126-44.

159. *Midland*, 110 L.R.R.M. (BNA) at 1494.

been laid for significant reduction in the Board's review of employers' predictions and interference in union elections.

VII. CONCLUSION

This article has attempted to demonstrate that the Board's long-standing policy of strictly controlling employers who make predictions of adverse consequences in the event of unionization is seriously flawed. First, the legislative history of the NLRA and early court decisions specifically recognized an employer's right to free speech. Furthermore, the Board has misconstrued and misapplied the test formulated by the Supreme Court in *NLRB v. Gissel Packing Co.*[160] In addition, the Board's policy of strict control fails to recognize employees as individuals capable of making their own decisions, and such a policy is seriously contradicted by a landmark empirical study.

Perhaps the Board's recent relaxation of its policy over claims of factual misrepresentation in union elections foreshadows a similar relaxation in the Board's control over employer predictions. Such a relaxation furthers the same goals the Board articulated in *Midland*,[161] that is, improving NLRB administrative economy, promoting uniformity in national labor law, and recognizing the basic intelligence and independence of the employee. The Board should continue the trend started in *Midland* and limit its review of employer predictions only to those predictions which invoke serious and generally unsupported adverse consequences of unionization.

MICHAEL J. BENNETT

160. 395 U.S. 575 (1969).
161. 110 L.R.R.M. (BNA) 1489 (1982).