24. INTERFERENCE WITH ELECTIONS

Introduction

Board elections are conducted on a basis of high standards designed to make certain that the employees in the voting unit or voting group enjoy the opportunity to exercise their franchise in a free and untrammeled manner in the choice of a bargaining representative.

We have already described the procedure (ch. 22) in the handling of objections to elections. We now turn to the substantive case law which deals with preelection campaign interference. This is discussed prior to our treatment of matters that affect the actual conduct of the election because it concerns the campaign which, of course, occurs in the period preceding the election, and is therefore a type of conduct quite different from that which occurs at or near the polling place on the day of the election. There is considerable overlap between 8(a)(1) conduct and preelection campaign interference. Because this is a text on representation case law, there will be only limited discussion of unfair labor practice case law.

24-100 Objections Procedures

Before discussing the law on what is and is not objectionable conduct, it is important that we summarize the procedural rules with respect to objections. See also CHM sections 11390–11406.

24-110 Objections Period

378-0180

As a general rule, the period during which the Board will consider conduct as objectionable—often called the "critical period"—is the period between the filing of the petition and the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). It is the objecting parties burden to show that the conduct occurred during the critical period. *Accubuilt, Inc*., 340 NLRB 1337 (2003); *Gibraltar Steel Corp.*, 323 NLRB 601 (1997); and *Dollar Rent-A-Car*, 314 NLRB 1089 fn. 4 (1994). The critical period begins on the date of the petition filing and covers all conduct occurring on that date even if it occurs before the time of the day when the petition was filed. *West Texas Equipment Co*., 142 NLRB 1358, 1360 (1963). The critical period for a second election commences as of the date of the first election. *Star Kist Caribe, Inc*., 325 NLRB 304 (1998).

Prepetition conduct may be considered where it "adds meaning and dimension to related postpetition conduct." *Dresser Industries*, 242 NLRB 74 (1979), and *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004). While generally such prepetition conduct cannot, standing alone, be a basis for an objection, *Data Technology Corp.*, 281 NLRB 1005, 1007 (1986), the Board has found clearly proscribed prepetition activity likely to have a significant impact on the election. See *Royal Packaging Corp.*, 284 NLRB 317 (1987); and *Gibson's Discount Center*, 214 NLRB 221 (1974), in which promises of benefit in violation of the *Savair Mfg Co*. doctrine—(*Savair Mfg. Co.*,414 U.S. 270 (1973))—was found to be objectionable prepetition conduct. See also *National League of Professional Baseball Clubs*, 330 NLRB 670 (2000); and *Yuma Coca-Cola Bottling Co.,* 339 NLRB 67 (2003)

In *Harborside Healthcare, Inc*., 343 NLRB 906 (2004), the Board affirmed the *Gibson Discount* exception to the *Ideal Electric Mfg. Co.* rule (134 NLRB 1275 (1961)) in the context of supervisor coercion to employees to sign union cards. The Board also commented in *Harborside*, supra at fn. 21:

> *Ideal Electric* notwithstanding, the Board will consider prepetition conduct that is sufficiently serious to have affected the results of the election.

Accord: *Madison Square Garden, Ct., LLC,* 350 NLRB 117 (2007).

In two cases the Board dealt with the appropriate objections period in cases where there are two petitions. In *R. Dakin & Co.*, 191 NLRB 343 (1971), and 207 NLRB 521 (1973), the Board held that conduct occurring prior to the operative petition was not to be considered even though it occurred after the filing of an earlier petition for the same unit, and the later withdrawal of that petition. A different result obtained, however, when the first and second petition were on file at the same time and the conduct occurred before the second petition. There, the conduct was considered as objectionable even though the first petition was withdrawn. *Monroe Tube Co*., 220 NLRB 302, 305 (1975); and *Carson International*, 259 NLRB 1073 (1982).

Postelection conduct by parties will not ordinarily be grounds for valid objections. *Mountaineer Bolt*, 300 NLRB 667 (1990).

24-120 Time for Filing Objections

393-7011

Objections to the election must be filed with the Regional Director within 7 days after the tally of ballots has been prepared. See Rule 102.69(a). Filing of objections is achieved by personal service in the Regional Office by close of business on the due date or by deposit of the objections in the mail prior to the due date. *John I. Haas, Inc*., 301 NLRB 300 (1991). However, delivery of a document to a delivery service on the due date will not excuse late delivery even where same day delivery is promised. The doctrine of "excusable neglect" can not apply in representation cases. Section 102.111(c) of the Rules.

The Regional Director is responsible for service of the objections on the other parties to the case. The objecting party is, however, required to provide the Regional Director with an original and five copies of the objections. Rule 102.69(a).

24-130 Duty to Provide Evidence of Objections

393-7011-5000

The burden is on the objecting party to provide evidence that the election should be set aside. *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982); *Lamar Advertising of Janesville*, 340 NLRB 979 (2003); and *Consumers Energy Co.*, 337 NLRB 752 (2002).

Within 7 days of the filing of objections, the objecting party must furnish the Regional Director with the evidence available to it in support of the objections. Rule 102.69(a). Although this period may be extended by the Regional Director, it is, in the absence of an extension, strictly enforced. *StarVideo Entertainment L.P.*, 290 NLRB 1010 (1988); and *Goody's Family Clothing*, 308 NLRB 181 (1992). See *Public Storage*, 295 NLRB 1034 (1989), in which the Board overruled a Regional Director's decision to accept late filed evidence, and *Koons Ford of Annapolis*, 308 NLRB 1067 (1992). Compare *Kano Trucking Service*, 295 NLRB 514 (1989), in which the Board accepted the evidence after the due date on a showing of good-faith reasonable effort to comply with the rule. Evidence mailed to the Regional Office before the due date is considered timely filed. See Rules, Section 102.111(b), and *Bi-Lo Foods*, 315 NLRB 695 (1994).

The evidence must establish a prima facie case in support of its objections. See *Park Chevrolet-Geo*, 308 NLRB 1010 (1992). The Board does not, however, require that the objecting party submit signed affidavits. It is sufficient if the party submits a summary of the evidence and the names of the witnesses who can provide testimony. *Daily Grind*, 337 NLRB 655 (2002), and *Heartland of Martinsburg*, 313 NLRB 655 (1994). The submission must be in writing. Compare *Sacramento Steel & Supply*, 313 NLRB 730 (1994).

24-l40 Scope of Investigation of Objections

393-7033-1100

393-7022-1700 et seq.

393-7077-2090

Under Section 102.69(d), the Regional Director may conduct either an administrative investigation of objections or set them for hearing or both. A hearing is held only when there are substantial and material issues of fact. *Care Enterprises*, 306 NLRB 491 (1992); and *Speakman Electric Co.,* 307 NLRB 1441 (1992). See also *Kerr-McGee Chemical Corp*., 311 NLRB 447 (1993), in which a divided Board directed a hearing to "aid us in determining on which side of the line drawn by our case law this case falls."

The Board will not consider allegations of misconduct unrelated to the objections unless the "objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but was also previously unavailable." *Rhone-Poulenc, Inc*., 271 NLRB 1008 (1984). This restriction does not apply to evidence discovered by the Regional Director. In fact, the Board will permit the Regional Director to set aside an election based on evidence uncovered during the investigation by the Regional Office even though it was not the subject of a specific objection. *American Safety Equipment Corp*., 234 NLRB 501 (1978). See also *Burns Security Services,* 256 NLRB 959 (1981).

For an excellent discussion of various aspects of the problem of unalleged objections, see *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988). See also *Framed Picture Enterprise*, 303 NLRB 722 (1991). The Board distinguished the authority of a hearing officer from a Regional Director in *Precision Products Group*, 319 NLRB 640 (1995). Thus, the hearing officer is constrained to consider the issues encompassed by the Regional Director's order setting matter for hearing. The Board compared *Iowa Lamb Corp*., 275 NLRB 185 (1985), with *American Safety Equipment*, supra. Accord: *Fleet Boston Pavilion*, 333 NLRB 655 (2001). *J. K. Pulley Co.,* 338 NLRB 1152 (2003), the Board applied a similar restriction to the hearing officer in a challenge ballot proceeding.

See section 22-119 for a discussion of the nature of the record on appeal to the Board from a decision of the Regional Director or hearing officer.

24-150 Estoppel in Objection Cases

A party to an election case is ordinarily estopped from relying on its own misconduct as objectionable. *B. J. Titan Service Co*., 296 NLRB 668 (1989), and *Republic Electronics*, 266 NLRB 852 (1983). The exception to this rule is the situation where the party causes an employee to miss the election, the employee's vote is determinative, there is no evidence of bad faith, and the employee is disenfranchised through no fault of his or her own. *Republic Electronics*, supra at 853.

In *Virginia Concrete Corp*., 338 NLRB 1182 (2003), the Board overruled *Ellicott Machine Corp*., 54 NLRB 732 (1944), a rather old case in which the Board had held that it would treat the withdrawal of a charge without prejudice as an automatic waiver by the petitioning union of the right to use the subject matter of that charge as a basis for objections to the election. In the *Great Atlantic & Pacific Tea Co*., 101 NLRB 1118 (1952), the Board abandoned the theory of waiver on which *Ellicott Machine* was decided holding that the policies of the Act would best be effectuated by considering on the merits any alleged interference which occurs during the crucial period before an election "whether or not charges have been filed." 101 NLRB at 1120–1121. A "request to proceed" is not a waiver of a right to file objections. *Graham Architectural Products Corp.,* 259 NLRB 1174, 1181 (1982); *Ed Chandler Ford*, 241 NLRB 1201 (1979); and *Bernel Foam Products Co.*, 146 NLRB 1277 (1964).

24-200 Legal Background of the "Free Speech" Issue

378-2885

501-2825

501-2862 et seq.

24-210 The Early Cases

The Board's early decisions, at least until 1941, were predicated on two major concepts. First, that every appeal by an employer in opposition to unions violated the Wagner Act provision against interference, restraint, and coercion because it inevitably created a fear in the minds of employees that the employer would use economic power against those who disregarded the employer's expressed desires. Second, that the choice of a bargaining representative was the exclusive concern of the employees and that the employer did not possess an interest sufficient to permit to intrusion. See Cox & Bok, *Labor Law Cases and Materials*, 170 et seq. (7th ed., 1969).

There was some conflict in the court of appeals and as is not infrequently the case when a conflict of principles becomes sharp enough in a significant area of law which by its nature is prone to a high emotional boiling point, the highest court of the land inevitably has to pass on it. This happened here. In 1941, in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), the United States Supreme Court was presented with the opportunity. The Court decided that the National Labor Relations Act did not prohibit employers from expressing their views about labor organizations, and this, for all practical purposes, marked the death knell of the so-called neutrality or enforced-silence requirement which had prevailed during the first 6 years. "The employer in this case," said the Court, "is as free as ever to take any side it may choose on this controversial issue."

This did not come as too great a surprise, for about a year earlier in *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Supreme Court had made it clear that in the circumstances of our times "the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution" and that "labor relations are not matters of mere local or private concern." Indeed, added the Court, "free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of industrial society."

Looking deeper into *Virginia Electric*, supra, which is our principal authority in the realm of free speech under the National Labor Relations Act, we find further guidance. Free as the employer is to express his views, the Court nonetheless admonished that "conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways." Id. at 477.

The case itself was remanded to the Board which subsequently held that the speech, not alone, but in the context of other conduct found coercive, amounted to an unfair labor practice, a finding which was ultimately upheld. *Virginia Electric & Power Co. v. NLRB*, 132 F.2d 390 (4th Cir. 1942), affd. 319 U.S. 533 (1943).

However, although *Virginia Electric & Power Co.* v. *NLRB*, supra, effectively ruled out the neutrality per se requirement and its correlative theory that every employer appeal inevitably created fear of economic reprisal in the minds of his employees, it did not answer all the questions, and some, even at this late date, are still with us.

Following the mandate of the Supreme Court, the Second Circuit in *NLRB v. American Tube Bending Co.*, 134 F.2d 993 (2d Cir. 1943), cert. denied 320 U.S. 708 (1943), formally erected a

tombstone to the memory of the "complete neutrality" doctrine. This is interesting since Judge Learned Hand wrote the opinion in *American Tube Bending* but also had given an exposition of the former rule in the earlier case of *NLRB v. Federbush Co*., 121 F.2d 954 (2d Cir. 1941), including his much quoted "words are not pebbles in alien juxtaposition" paragraph in that opinion.

The host of Board and court findings in unfair labor practice cases in the 1941–1947 period suggested that anything short of coercion, threats, or promises of economic benefits was privileged speech so long as the employer's activities did not interfere with employees' rights as guaranteed by the Act. But despite this implementation of the Supreme Court's decision, agitation during the consideration of the Taft-Hartley Amendments in 1947 was potent enough to lead to the inclusion of a new provision in the form of Section 8(c), which reads as follows:

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

The experts differ both as to the necessity and the effect of this provision, although all seem to agree that the legislative history surrounding its enactment is confusing. See Cox, *Some Aspects of the Labor-Management Revisions Act*, Harv. L. Rev. 1620 (1947); Wollett & Rowen, *Employer Speech and Related Issues*, 16 Ohio State L.J. 384 (1955). The prevailing view, it would appear, is that Section 8(c) was simply a codification of the rule laid down by the Supreme Court and is supported by the statement of Senator Taft, who, in opening the debate in the Senate, declared that the provision guaranteeing free speech to employers "carries out approximately the present rule laid down by the Supreme Court of the United States. It freezes that rule into law itself rather than to leave employers dependent on future decisions." 93 Cong.Rec. 3953 (Apr. 4, 1947). During the interval between *NLRB v. Virginia Electric & Power Co*., supra, and the Taft-Hartley Amendments, it seems clear that this was the rule followed by the Board and the courts. See Bloom, *Freedom of Communication Under the Labor Relations Act* (Proceeding of New York University Eighth Annual Conference on Labor, p. 222 (1955)).

24-220 Intervening Period and *Gissel* (*Sinclair*)

378-2835

378-2885

501-2875 et seq.

During the 22-year period that intervened between 1947, the year Section 8(c) was enacted, and the year 1969, serious questions had been posed in an area which inexorably appeared headed for a showdown: When is a statement a mere prophecy or prediction, and therefore not actionable as a basis for an 8(a)(1) violation or as ground for invalidating an election, and when is it a threat, and therefore both a statutory violation as well as objectionable preelection conduct?

Again, a crucial controversy in the "free speech" area, arriving several decades after *Virginia Electric* and its codifying statutory counterpart Section 8(c), reached the United States Supreme Court. The year was 1969 and the case was *Gissel Packing Co*., 395 U.S. 575 (1969). More specifically, it was that portion of *Gissel* which dealt with an appeal from the holding of the Board and the First Circuit in *NLRB v. Sinclair Co*., 397 F.2d 157 (1st Cir. 1968), a companion case, on first amendment grounds.

The First Circuit had enforced a Board order which, in pertinent part, was based on a finding that the employer's communications with the employees reasonably tended to convey the belief that selection of the union in a forthcoming election could lead the employer to close the plant or to transfer the weaving production, with a resultant loss of jobs. The First Circuit also affirmed

the Board's invalidation of the election because the activities in question interfered with the exercise of a free choice.

The Supreme Court, with specific reference to the "free speech" issue, stated that an employer is free to communicate views on unionism or about a specific union, so long as the communications do not contain a threat of reprisal or force or promise of benefit. "He may even make a prediction," added the Court, "as to the precise effects he believes unionization will have on his company. In such a case, however, 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."

Pinpointing the distinction between a threat and a prediction, the Court went on to say (395 U.S. at 618).):

> *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.* [Emphasis added.]

The Supreme Court found equally valid the findings by the First Circuit and the Board that the employer's statements and communications were not cast as a prediction of demonstrable economic consequences, but rather as a threat of retaliatory action. It relied on the findings that the employer's communications conveyed the following message: that the company was in a precarious financial condition; that 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 case would have great difficulty finding employment elsewhere.

In these circumstances, concluded the Court (395 U.S. at 619):

> *The Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities.* [Emphasis added.]

In arriving at this conclusion, the Court pointed out that (1) the employer had no support for his basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and (2) the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints "as coercive threats rather than honest forecasts." See, for example, *Kolmar Laboratories*, 159 NLRB 805 (1966), enfd. 387 F.2d 833 (7th Cir. 1967); and *Suprenant Mfg. Co*., 144 NLRB 507 (1963), enfd. 341 F.2d 756 (6th Cir. 1965).

Significantly, in responding to the argument that the line between permitted predictions and proscribed threats is too vague to stand up under the traditional first amendment analysis and the further argument that the Board's discretion to curtail free speech rights is correspondingly too uncontrolled, the Supreme Court (395 U.S. at 620) acknowledged, in effect, the Board's competence "to judge the impact of utterances made in the context of the employer-employee relationship," and added the pointed comment that

> *an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "`brinkmanship"' when it becomes all too easy to "overstep and tumble over the brink."* [Emphasis added.] *Wausau Steel Corp. v. NLRB*, 377 F.2d 389 (7th Cir. 1967).

24-230 The Later Cases

378-2835

378-2885

501-2875-7000

Following the Supreme Court's pronouncement on the "free speech" issue, the Board and the courts have had occasion to decide cases in which the *Gissel* (*Sinclair*) decision was the touchstone.

In *NLRB v. C. J. Pearson Co*., 420 F.2d 695 (1st Cir. 1969), the First Circuit observed that it read the Supreme Court's decision as indicating two ways in which an employer's "predictions" as to possible unhappy consequences of unionization might transgress: (1) the employer might indicate that unnecessary consequences would be deliberately inflicted, i.e., a threat of retaliation, or (2) it might indicate consequences not within its control but described as probable or likely, when in fact there was no objective evidence of any such likelihood; i.e., a threat, albeit not retaliatory, but nonetheless improper.

The Board found employer conduct actionable which conveyed the following message: It had determined the wage and benefit increases it could afford to grant; and that if the anticipated demands of the union were exorbitant, it would not only reject these demands, thus precipitating a strike, but would close its plant before giving in to the union; that it could afford to do this because it had other plants to which work had been shifted in the past and could be again, or, alternatively, that the strikers would be permanently replaced, losing their jobs. While an employer has the right to present in a rational context its views on the potential disadvantages of unionism, conjuring up the vision of a strike as inevitable, "a fact which he is certainly in the best position to appreciate," the Board reasoned, created an obvious potential for interference with free choice. Setting aside the election, the Board cited the comment of the Supreme Court in *Gissel* that an employer "can easily make his views known without engaging in brinkmanship." *Unitec Industries*, 180 NLRB 51 (1970). And, critically, the statements or predictions of the possible adverse consequences of union organization must be based on objective facts. *Southern Labor Services,* 336 NLRB 710 (2001), and *AP Automotive Systems,* 333 NLRB 581 (2001).

In a series of cases beginning with *Eagle Comtronics*, 263 NLRB 515 (1982), the Board set out the standard for assessing employer remarks about the consequences of a strike. In *Eagle* the Board found that the statement that a striker could be replaced by applicants on file was not a threat of job loss. But, where employees are told "you could lose your job to a permanent replacement" the Board found a threat of reprisal. *Larson Tool & Stamping Co*., 296 NLRB 895 (1989). See also *Warren Manor Nursing Home*, 329 NLRB 3 (1999); *Baddour, Inc*., 303 NLRB 275 (1991); and *Fiber-Lam, Inc.*, 301 NLRB 94 (1991). See also *Warren Manor Nursing Home*, supra. Compare *Novi American, Inc.,* 309 NLRB 544 (1992).

Remarks about high labor costs in the context of earlier distributed literature pertaining to the removal of the parent company's operations to Mexico were found veiled threats to close this plant should the union be selected. *Sprague Ponce Co*., 181 NLRB 281 (1970). See also *Penland Paper Converting Corp*., 167 NLRB 868 (1967).

On the other hand, "in the total context of the Employer's noncoercive conduct during the election campaign," the Board found no actionable threat in a Spanish letter to voters, which varied from the English version, and which contained the following:

> These organizers will invite you to meetings, meals and perhaps even to have a drink, they will make promises which they will never keep, they will hurt your Employer, they will go on strike, etc. etc. And this will affect you, since you will lose days of work and will risk your stable position out of irresponsibility, and it will affect you also in an economic sense, since you will be paying your dues minus your regular wages, that is to say money will be missing as it always is during these demonstrations and absences from work.

The Board concluded that the above paragraph of the Spanish version was no more than a statement of opinion predicting events that might occur should the union win the election. *Desert Laundry*, 192 NLRB 1032 (1971). For a discussion of employer statements concerning strikes as a consequence of unionism, see *Fred Wilkinson Associates*, 297 NLRB 737 (1990). Compare *Novi American, Inc.*, supra.

The Board's test regarding statements is whether a remark can reasonably be interpreted by an employee as a threat. The test is not the actual effect on the listener. *Smithers Tire*, 308 NLRB 72 (1992), and *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231 fn. 2 (1999).

The Ninth Circuit, in *NLRB v. Electric Co*., 438 F.2d 1102 (1971), recapitulated the Supreme Court's holding by stating that "an employer may not impliedly threaten retaliatory consequences within his control, nor may he, in an excess of imagination and under the guise of prediction, fabricate hobgoblin consequences outside his control which have no basis in objective fact." But, contrary to the Board, the court found nothing in expressions by a company supervisor which would constitute either an express or implied threat of retaliatory action. The statements, said the Ninth Circuit, must be considered "in the context of the factual background in which they were made, and in view of the totality of employer conduct." Thus, the statements were, at most, "predictions of possible disadvantages which might arise from economic necessity or because of union demands or union policies." Moreover, added the court, there was a factual basis for all the predictions made. Compare *NLRB v. Raytheon Co*.,, 445 F.2d 272 (9th Cir. 1971), 445 F.2d 272 (9th Cir. 1971) 445 F.2d 272 (9th Cir. 1971). See also *Boaz Spinning Co. v. NLRB*, 439 F.2d 876 (6th Cir. 1971). *Churchill's Restaurant*, 276 NLRB 775 (1985).

However, in *NLRB v. Taber Instruments*, 421 F.2d 642 (2d Cir. 1970), the Second Circuit enforced a Board order predicated, inter alia, on statements such as these: "The men don't realize what they could lose in this election. If Teledyne chooses to, they could phase out these operations throughout their other plants"; and "there was a possibility that in the event that the union was successful that the Company, if they thought it in their best interest, could move some of the departments into other plants of the Teledyne Corporation." *Roskin Bros., Inc.,* 274 NLRB 413 (1985); and *Southwire Co*., 277 NLRB 377 (1985), enfd. 820 F.2d 453 (D.C. Cir. 1987).

In *Mohawk Bedding Co*., 204 NLRB 277 (1973), the Board found that the employer's campaign speeches and literature, as well as certain statements, taken as a whole, created "an atmosphere of apprehension in the minds of the voters." Among the statements found objectionable was one, couched in the language of a disclaimer, which, the Board found, underscored the threat: "Well, I don't want to threaten you, but it's very important for you to understand something. If the union wins the election tomorrow, and if in bargaining with us they really try to make good on the fantastic figures mentioned in the leaflets, then we could all be in for serious trouble." He continued by stating that "there would be a question as to whether the company could remain in business here." Moreover, it was the Board's view that, by the employer's repeated reference to the union causing other plants to close and the high unemployment situation locally, the employees could reasonably infer that their employment would be jeopardized if they supported the union. See also *General Electric Wiring Devices*, 182 NLRB 876 (1970). Compare *Kawasaki Motors Mfg. Corp*., 280 NLRB 491 (1986), finding protected 8(c) speech.

In *Renton Issaquah Freightlines*, 311 NLRB 178 (1993), the Board found as objectionable an employer's statement that the question of whether the plant would reopen depended on whether the employees voted to decertify the union. The Board adopted the Regional Director's finding that the prediction of dire consequences if the employees did not decertify the union interfered with the election. See also *Madison Industries*, 290 NLRB 1226 (1988), cited by the Board in *Renton* as well as the cases cited by the Regional Director in *Renton*. See also two recent plant closure threat cases *Dominion Engineered Textiles*, 314 NLRB 571 (1994); *Shelby Tissue, Inc.*, 316 NLRB 646 (1995); and a case involving a threat of loss of a 401(k) plan. *Hertz C*orp., 316

NLRB 672 (1995). Compare *TCI Cablevision of Washington*, 329 NLRB 700 (1999) (statement that represented employees do not get 401(k) plan was not objectionable), and *CPP Pinkerton*, 309 NLRB 723 (1992), where a caution that jobs could be lost if the employer did not remain competitive was found unobjectionable.

In *Glasgow Industries*, 204 NLRB 625 (1973), despite a general manager's avowal that he wanted to win the election but to run "a clean campaign that was entirely within the law," and the use of a "checklist" of "do's and dont's" to guide supervisory conduct, statements were made which required the Board to invalidate the election. Thus, a foreman told an employee that "if the Union comes in, the order will be cancelled and you will have no work"; another foreman stated that "if you all vote this Union in, this plant could move to Mexico." The Seventh Circuit, in *NLRB v. Roselyn Bakeries*, 471 F.2d 165 (7th Cir. 1972), , summarized this area of the law in the following statement of principles:

> If there is any implication that employer may or may not take action solely on his own initiative for reasons unrelated to economic necessity and known only to him, the statement is no longer a reasonable prediction based on available facts, but is a threat of retaliation based on misrepresentation and coercion and, as such, without the protection of the First Amendment. *Gissel*, supra, p. 618. Any balancing of the rights of the employees under §7, as protected by §8(a)(1) and the proviso in §8(c), must take into account the economic dependence of the employees on the employers and the necessary tendency of the former, because of that relationship, to be alerted to intended implications of the latter that might be more promptly dismissed by one who was entirely disinterested. Beyond question, employees are particularly sensitive to rumors of plant closing and view such rumors as coercive threats, rather than honest forecasts.

In *SPX Corp*., 320 NLRB 219 (1995), the Board rejected the employer's contention that its statement that its customers would not use union contractors was unobjectionable. The Board relied on the absence of any record support for the employer's statement.

In *Georgia-Pacific Corp.*, 325 NLRB 867 (1998), a divided Board found objectionable an employer preelection announcement that being represented by the Union would make the employees ineligible for the bonus plan. Accord: *Cooper Tire & Rubber Co.,* 340 NLRB 958 (2003).

For an analysis of the views of two circuits which have rejected Board positions and found conduct to be predictions based on objective facts, see *NLRB v. Shenanigans*, 723 F.2d 1360 (7th Cir. 1983); and *Patsy Bee, Inc. v. NLRB*, 654 F.2d 515 (8th Cir. 1981). Compare *Zim's Foodliner v. NLRB*, 495 F.2d 1131 (7th Cir. 1974).

24-300 Preelection Campaign Interference

378-2862

In an area characterized by a myriad of different factual situations, involving all kinds of nuances and shades of difference, any attempt at a ready-reference primer is doomed to failure. Nonetheless, it is possible to cull general principles from specific cases and to attempt to extract the reasons which brought these principles into being. Moreover, despite the large number of variations, it is also reasonably possible to group areas which have much in common under separate headings. Thus, for example, preelection campaign interference may be the subject both of unfair labor practice proceedings and objections to the election; it may consist of conduct of the *General Shoe Corp*., 77 NLRB 124 (1948), type which does not, for one reason or another, also violate the unfair labor practice provisions of the Act; it may be conduct attributable to a third party; or it may involve the infringement of a per se rule. With the exception of conduct which is an unfair labor practice (see sec. 24-310), all of these areas are considered in this chapter.

In *Taylor Wharton Division*, 336 NLRB 157 (2001), the Board stated:

> [The] proper test for evaluating conduct of a party is an objective one—whether it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg. [Co.],* 316 NLRB 716 (1995). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Avis Rent-a-Car System*, 280 NLRB 580, 581 (1986).

Accord: *Cedars-Sinai Medical Center,* 342 NLRB 596 (2004).

24-310 Interference Which may also Violate the Unfair Labor Practice Provisions

378-1401-2500 et seq.

378-2862

Conduct which by statutory proscription constitutes unfair labor practice violations may also be, as we shall soon see, the basis for invalidating an election, if merit is found in the objections in which they are alleged. As the Board commented in *Playskool Mfg. Co*., 140 NLRB 1417 (1963), "conduct of this nature which is violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." See also *IRIS U.S.A., Inc*., 336 NLRB 1013 (2001); and *Diamond Walnut Growers, Inc*., 326 NLRB 28 (1998). This is so "because the test of conduct which may interfere with the "laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co*., 137 NLRB 1782 (1962). See also *Overnite Transportation Co*., 158 NLRB 879 (1966); and *Excelsior Underwear*, 156 NLRB 1236 (1966).

Earlier editions of this text included considerable discussion of unfair labor practice cases which arose during election campaigns and thus became the basis for election objections. This material duplicated unfair labor practice texts and did not add significantly to a study of representation case law. Accordingly, the material has not been included in this edition and the researcher is directed to those research tools which index unfair labor practice case law.

It is important, however, to add a caveat to the a fortiori statements cited above. That caveat is that not all unfair labor practice conduct will warrant setting aside an election. In *Caron International,* 246 NLRB 1120 (1979), the Board rejected a per se approach to the a fortiori language of *Playskool*. Instead, the Board announced that it would examine the unfair labor practice conduct to determine whether it was extensive enough to interfere with the election. See also *Video Tape Co*., 288 NLRB 646 (1989); *Metz Metallurgical Corp*., 270 NLRB 889 (1984); and *General Felt*, 269 NLRB 474 (1984). See also *Recycle America*, 310 NLRB 629 (1993), in which the Board found that the unfair labor practices were not sufficient to set aside the election.

The test is an objective one—whether the conduct has a tendency to interfere with employee free choice. *Hopkins Nursing Care Center*, 309 NLRB 958 (1992).

In one interesting case, the Board found that an assertion by a union that employees would lose their jobs if they voted against the union was not objectionable. The Board likened this statement to that in *Janler Plastic Mold Corp*., 186 NLRB 540 (1970), and characterized it as illogical. The Board compared that situation with that in *NLRB v. Valley Bakery*, 1 F.3d 769 (9th Cir. 1993); and *Underwriters Laboratories*, 323 NLRB 300 (1997).

In addition, the Board has held that certain unfair labor practice conduct does not pose a threat of restraint and coercion of employees and therefore is not a fortiori objectionable conduct. Thus, in *Holt Bros*., 146 NLRB 383 (1964), the Board found that the entering into of a contract which contained a clause prohibited by Section 8(e) of the Act was not objectionable. See also *ARA Living Centers*, 300 NLRB 888 (1990), in which the Board reached a similar result with respect to picketing in violation of Section 8(g) of the Act which occurred at another facility of the employer and which was publicized to the employees by the employer. Compare *Curtin Matheson Scientific*, 310 NLRB 1090 (1993), finding an unlawful no-solicitation rule to be objectionable.

24-311 De Minimis or Isolated Conduct

As discussed more fully in section 24-310, supra, the Board does not find that any unfair labor practice conduct warrants setting aside an election. It goes without saying, therefore, that not all otherwise unlawful conduct will set aside the election.

As the Board noted in *Airstream, Inc.,* 304 NLRB 151, 152 (1991):

> A violation of Section 8(a)(1) found to have occurred during the critical election period is, a fortiori, conduct which interferes with the results of the election unless it is so de minimis that it is "virtually impossible to conclude that [the violation] could have affected the results of the election." *Enola Super Thrift*, 233 NLRB 409 (1977).

The Board has applied the "virtually impossible" standard in consolidated unfair labor practice and representation cases in which conduct found to violate Section 8(a)(1) is also alleged in election objections. That standard does not apply in representation proceeding where there are no unfair labor practice allegation or finding. *NYES Corp.,* 343 NLRB 791 fn. 2 (2004). Instead the Board applies the standard set forth in *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995), viz., whether the misconduct, taken as a whole, warrants a new election because it has "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Metaldyne Corp.,* 339 NLRB 443 (2003). See also *Waste Management of Pennsylvania*, 314 NLRB 376 (1994). See also *Mercy General Hospital*, 334 NLRB 100 (2001).

In *Bon Appetit Management Co*., 334 NLRB 1042 (2001), the Board described the test for determining whether conduct is de minimis. See also *Sir Francis Drake Hotel,* 330 NLRB 638 (2000) (margin of election results can be a factor); and *Chicagoland Television News*, 330 NLRB 630 (2000)**.**

In *Double J. Services,* 347 NLRB No. 58 (2006) (not reported in Board volumes), a divided Board overruled the hearing officer who had found certain changes in work policies to be de minimus. The Board noted that these changes were announced without explanation shortly before the election and that they had a greater effect on the unit than the hearing officer found.

24-312 Litigation of Unfair Labor Practice Issues in Representation Cases

The general rule is that the Board will not permit the litigation of unfair labor practice cases in representation proceedings. See section 3-920 of this text.

This does not mean of course that the Board will not consider unfair labor practice findings in deciding objection cases. Rather, as discussed more fully, supra (sec. 24-310), unfair labor practice conduct that is litigated in an unfair labor practice case can also be found to be objectionable conduct.

But, in the absence of a complaint, the Board will not consider some unfair labor practice issues in objections or challenge proceedings especially those involving Section 8(a)(3). *Texas Meat Packers*, 130 NLRB 279 (1961), and *McLean Roofing Co*., 276 NLRB 830 fn. 1 (1985). On the other hand, conduct which amounts to interference and might otherwise constitute 8(a)(1) conduct will generally be considered in an objection proceeding. See section 24-310, supra. The fact that an unfair labor practice charge alleging the same conduct as in the objections was

dismissed does not require pro forma dismissal of the objections *ADIA Personnel Services*, 322 NLRB 994 fn. 2 (1997). See section 14-700 for discussion of alter ego litigation.

In *Gaylord Bag Co*., 313 NLRB 306 (1993), the Board rejected an employer's contention that settlement of unfair labor practice charges against a union precluded its ability to establish that a petition should be dismissed. The Board, in doing so, noted that these are independent matters.

24-313 Narrowness of the Election Results

As indicated, the narrowness of the vote in an election is a relevant consideration. *Robert Orr–Sysco Food Services*, 338 NLRB 614 (2002). It is not, however, dispositive and as the Board noted in *Accubuilt, Inc*., 340 NLRB 1337 (2003), it will assess the general atmosphere at the location "rather than comparing the number of employees subject to any sort of the threats against the vote margin." See also *Lamar Advertising of Janesville,* 340 NLRB 979 (2003).

24-314 Dissemination

In assessing whether conduct interfered with the election "the Board considers the number of incidents, their severity, the extent of dissemination, the size of the unit and other revelant factors," *Archer Services*, 298 NLRB 312 (1990). See also *Gold Shield Security & Investigations*, 306 NLRB 20 (1992); and *Peppermill Hotel Casino*, 325 NLRB 1202 fn. 2 (1998) (dissemination to even one voter could have affected results of election that ended in a tie vote).

In *Crown Bolt, Inc.,* 343 NLRB 776 (2004), a divided full Board reversed *Springs Industries*, 332 NLRB 40 (2000), and "all other decisions in which the Board has presumed dissemination of plant-closure threats or other kinds of coercive statements." The Board stated that such threats are "very severe" but that "severity of a threat is one factor, among several, to be considered in deciding whether to set aside an election. See *Caron International*, supra (noting the factors the Board considers in deciding whether misconduct affected the results of an election; factors include the number of violations, their severity, the extent of dissemination and the size of the unit)." (Supra at 779.) See also *MB Consultants, Ltd*., 328 NLRB 1089 (1999); *Eric Brush & Mfg. Corp*., 338 NLRB 1100 (2003); and *Hollingsworth Management Service*, 342 NLRB 556 (2004).

In *Freund Baking Co*., 336 NLRB 847 (2001), a divided panel concluded that a security/confidential information provision in an employee handbook was both unlawful and objectionable. The provision limited discussion among employees of inter alia, wages, hours, and conditions of employment. Compare *Safeway, Inc.,* 338 NLRB 528 (2003).

24-320 Types of Interference Under the *General Shoe* Doctrine

378-1401-5000

1401-6700

We turn now to conduct, often the relevant basis for setting aside an election, which is not also violative of any of the unfair labor practice provisions of the Act. Broadly speaking, the areas of interference with elections we shall now consider stem out of the *General Shoe* doctrine, formulated by the Board in 1948 (*General Shoe Corp*., 77 NLRB 124 (1948)). Enunciated shortly after the 1947 amendments when Section 8(c) was already on the books, it suggests itself as a good beginning for a phase of preelection campaign interference which, being confined to representation proceedings, merits even more emphasis in a volume such as this.

The *General Shoe* doctrine holds that conduct which creates an atmosphere which renders improbable a free choice will warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. In adopting this rule, the Board rejected the contention that the criteria applied by the Board in a representation case to decide whether an election was interfered with need necessarily be identical to those used to determine whether an unfair labor practice had been committed.

In *General Shoe* itself, a consolidated complaint and representation proceeding, although the respondent's activities immediately before the election were not held to constitute unfair labor practices, certain of these activities were nonetheless found to have created "an atmosphere calculated to prevent a free and untrammeled choice by the employees."

The Board summarized the doctrine in the following language:

> In election proceedings, it is *the Board's function to provide a laboratory in which an experiment* may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again. [77 NLRB at 127.]

At the same time, the Board noted that Congress only applied what was then the new Section 8(c) to unfair labor practice cases.

Years later, when this dichotomy was again examined by the Board, it reaffirmed its original view by stating that "Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases and it has no application to representation cases," reversing specifically several of its decisions during an intervening period which suggested the contrary. The Board added, however, that the "strictures of the first amendment, to be sure, must be considered in all cases." *Dal-Tex Optical Co*., 137 NLRB 1782 fn. 11 (1962).

Under the *General Shoe* heading, it is also important to again emphasize what we have done before—that the test of conduct which may interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct amounting to interference, restraint, or coercion which violates Section 8(a)(1). See, for example, the decision in *Edward J. DeBartolo Corp*., 313 NLRB 382 (1993), where the Board found that the refusal of the union to leave the employer's premise did not interfere with the election distinguishing the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), relied on by the employer.

An Exception—In *Showell Poultry Co*., 105 NLRB 580 (1953), the Board decided against setting aside an election where the employer engaged in objectionable conduct as to two unions, one of whom won the election. See also *Flat River Glass Co*., 234 NLRB 1307 (1978), *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2003); and *Randall Rents of Indiana*, 327 NLRB 867 fn. 6 (1999), and section 24-325 of this chapter. Compare *President Container, Inc*., 328 NLRB 1277 (1999) (misconduct directed at only one union).

For a summary of the factors which the Board evaluates in deciding whether the employees could freely and fairly exercise free choice in the election. See *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). Compare *Station Operators*, 307 NLRB 263 (1992); and *Champaign Residential Services*, 325 NLRB 687 (1998), distinguishing *Phillips*. See also *Yale Industries*, 324 NLRB 848 (1997) (timing of announcement of benefit increase objectionable), and *American Freightways*, 327 NLRB 832 (1999) (single instance does not establish past practice of soliciting grievances).

A few cases reflect the Board's policy on types of objectionable conduct. See, for example, *Sun Mart Foods,* 341 NLRB 161 (2004) (promises to remodel store); *Deaconess Medical Center*, 341 NLRB 589 (2004) (promise to restore wages); *STAR, Inc*., 337 NLRB 962 (2002) (grant of wage increase); *Petrochem Insulation, Inc.,* 341 NLRB 473 (2004) (threat of reduced wages); *Waste Management, Inc.,* 330 NLRB 634 (2000) (discriminatory bulletin board policy); *Network Ambulance Services*, 329 NLRB 1 (1999) (holiday benefits granted during critical period, not objectionable); *United Methodist Home of New Jersey*, 314 NLRB 687 (1994); *Kauai Coconut Beach Resort*, 317 NLRB 996 (1995) (timing of pay raises); *Steeltech Mfg*., 315 NLRB 213 (1994) (promulagation of rules during critical period); *Lutheran Retirement Village*, 315 NLRB 103 (1994); *ADIA Personnel Services*, .supra (promise of benefits); *Ameraglass Co*., 323 NLRB

701 (1997) (acceleration of benefits); *Comet Electric*, 314 NLRB 1215 (1994) (failure to pay employees for attendance at captive audience speech); *JTJ Trucking*, 313 NLRB 1240 (1994) (union statement of no health coverage if employees vote against union found not objectionable); *Lalique N.A., Inc*., 338 NLRB 986 (2003) (union promise of medical benefits if it won election not objectionable); and *Nestle Dairy Systems*, 311 NLRB 987 (1993), enf. denied 46 F.3d 578 (6th Cir. 1995) (filing RICO lawsuit, not objectionable). *Washington National Hilton Hotel*, 323 NLRB 222 (1997), offering to put employees in contact with a news reporter who was doing a story on organizing, not objectionable. *MacDonald Machinery Co*., 335 NLRB 319 (2001). Compare *Majestic Star Casino, LLC*, 335 NLRB 407 (2001). For an extensive discussion of whether or not an employer breach of its own no-solicitation rule is objectionable, see *Hale Nani Rehabilitation & Nursing*, 326 NLRB 335 (1998).

In two other cases, the Board found that added security measures after the filing of the petition including an additional armed guard on the day of the election was not objectionable—*Quest International*, 338 NLRB 856 (2003), and that an employer memorandum to employees indicating the possible loss of benefits in negotiations if the union won the election was not a basis for setting aside the election. *Manhattan Crowne Plaza Town Park Hotel Corp*., 341 NLRB 619 (2004).

In one interesting case, the Board found that the employer did not engage in objectionable conduct when it posted a letter from a customer indicating that unionization by the employees might occasion the customer making other business arrangements. *Eagle Transport Corp*., 327 NLRB 1210 (1999).

Frequently the issue is the timing of the grant of benefit. The general rule is that "the employer is required to proceed with projected wage or benefit improvements as if the union were not on the scene." *Niblock Excavating, Inc.,* 337 NLRB 53 (2001); *Network Ambulance Services*, 329 NLRB 1 (1999); and *Waste Management of Palm Beach*, 329 NLRB 198 (1999). Compare *Tinius Olsen Testing Machine Co*., 329 NLRB 351 (1999) (change required by contract not objectionable). See also *Onan Corp.,* 338 NLRB 913 (2003); and *Mercy Hospital Mercy Southwest Hospital*, supra.

As the Board explained more fully in *United Airlines Services Corp.*, 290 NLRB 954 (1988):

> It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a; type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964). As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *R. Dakin*, [*& Co.,* 284 NLRB 98, 98 (1987)], quoting *Reds Express*, 268 NLRB 1154, 1155 (1984). In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. *Uarco, Inc*., 216 NLRB 1, 2 (1974). See, e.g., *Singer Co.,* 199 NLRB 1195 (1972). [Footnote omitted.]

The Board will permit an employer to describe and make a comparison of its benefits for its unrepresented employees provided that this is not accompanied by an implied promise of benefit. *Langdale Forest Products Co.,* 335 NLRB 602 (2001); *Suburban Journals of Greater St. Louis,* 343 NLRB 157 (2004), distinguishing *Etna Equipment & Supply Co.,* 243 NLRB 596 (1979).

With respect to union promises of benefit, the Board has held that "[e]mployees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises . . . are easily recognized by employees to be dependent on contingencies beyond the union's control and do not

carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises of benefits." *Smith Co.,* 192 NLRB 1098, 1101 (1971). See also *Lalique N.A., Inc*., supra.

Alyeska Pipeline Service Co., 261 NLRB 125 (1982), represents a limited exception to this general rule. In *Alyeska*, the union controlled "all access to construction jobs in Alaska for the employees participating in the election. Therefore, when the union suggested that the only way employees could obtain a union card was by voting for the union in the upcoming election and that "those fortunate enough to possess a Local 1547 membership card would be in an extremely favorable priority position [when it came to hiring] compared with those lacking a card, it was clear not only that the union was promising to grant members an advantage over nonmembers in obtaining jobs, but also that the union had the power to effectuate that promise." In *Station Operators,* 307 NLRB 263 fn. 1 (1992), the Board made clear that the holding in *Alyeska* was tied to its special facts.

For discussion of supervisory prounion conduct, see section 24-328.

24-321 Assembly of Employees at a Focal Point of Authority and Home Visitations

378-2816

378-4242

Among the issues that the Board has had to determine in this area of law is the one that deals with the assembly of employees by the employer at a focal point of authority. Indeed, in *General Shoe* itself this was a question for the Board to decide.

On the day before the election the employer had the employees brought to his office in 25 groups of 20 to 25 and, in the language of that decision, "in the very room which each employee must have regarded as the locus of final authority in the plant, read every small group the same intemperate anti-union address." In the same case, the employer instructed his supervisors "to propagandize employees in their homes." The Board found that this went "so far beyond the presently accepted custom of campaigns directed at employees' reasoning faculties that we are not justified in assuming that the election results represented the employees' own true wishes." These were not unfair labor practice findings. They were determinations based on the policy that matters which may not be available to prove a violation, but may still be pertinent, "if extreme enough"—to borrow a Board phrase—in deciding whether an election satisfies the Board's own administrative standards.

In *Economic Machinery Co*., 111 NLRB 947 (1955), "the technique of calling the employees into the Employer's office individually to urge them to reject the Union," the Board held, "is, in itself, conduct calculated to interfere with their free choice in the election." The employer had privately interviewed all employees in his office. In some instances the interviews were as long as 3 hours. The Board reasoned that this was interference with the election "regardless of the non-coercive tenor of an employer's actual remarks."

Where company officials and supervisors called at employees' homes, the Board found that the cumulative effect of the interviews in these circumstances, which admittedly established the company's disapproval of the petitioning union, interfered with their free choice. In this posture, too, the election was set aside despite the absence of actual coercion. The Board reiterated the rule which consistently condemns the technique of calling all or a majority of the employees in the unit into the employer's office individually or calling on them at their homes to urge them to reject a union as their bargaining representative. *Peoria Plastic Co*., 117 NLRB 545 (1957); see also *Hurley Co*., 130 NLRB 282 (1961).

In *NVF Co*., 210 NLRB 663 (1974), the Board concluded that cases involving the technique of calling employees either individually or in small groups into private areas to urge them to vote against the union was not per se objectionable. Rather, each case will be considered on its facts to

determine whether the election represents the employee's wishes. See also *Flex Products*, 280 NLRB 1117 (1986).

"The unique effectiveness of speeches addressed to employees assembled during working hours at the locus of their employment," the Board noted, "has received congressional and judicial recognition and has been substantiated by research studies." See *H. W. Elson Bottling Co*., 155 NLRB 714, 716 fn. 7 (1965); also *NLRB v. United Aircraft Corp*., 324 F.2d 128 (2d Cir. 1963), cert. denied 376 U.S. 951 (1964). It would seem that a vital factor in the Board's reasoning is that when individual employees are taken from their workplaces and subjected to antiunion propaganda at the hands of a supervisor in the privacy of a company office or in an isolated area away from other employees, there is a "likelihood that outright fear or uneasiness tinged with fear as to the consequences of unionism will be created in the mind of the employee thus singled out for special attention." *Great Atlantic & Pacific Tea Co*., 140 NLRB 133, 134 (1963).

The rationale for invalidating elections involving the assembly of employees is not unlike the rationale in cases involving home visitations by officials and supervisors of the employer. In the latter situation the Board has made it clear that, whether or not the remarks during such visitations were coercive in character, the technique of visiting employees at their homes to urge them to reject the union as their bargaining representative is a ground for setting aside an election. See, for example, *F. N. Calderwood, Inc*., 124 NLRB 1211 (1959). The crux of that rationale is in the fact that the employer has "the position of control over tenure of employment and working conditions which imparts the coercive effect to systematic individual interviews" that it conducts. *Plant City Welding & Tank Co*., 119 NLRB 131, 133–134 (1957).

The Board does not use a mechanistic approach but gives full consideration to all the circumstances. Thus, where 2 days before an election, several nurses aides were appealed to for a no-vote in noncoercive terms by the employer's executive director at a meeting in the nursing director's office, this incident was held not to justify setting aside the election under the *General Shoe Corp*., 77 NLRB 124 (1948), "locus of managerial authority" doctrine, since the office was the regular place of work of the admissions nurse and had been used for training sessions. *Three Oaks, Inc*., 178 NLRB 534 (1969).

A significant exception to the rule relating to employee interviews at the plant is found in *Mall Tool Co*., 112 NLRB 1313 (1955). In that case, the employer spoke to about half of its employees at their workbenches. The interviews lasted no more than 3 minutes. In these circumstances, the interviews were distinguished from the *Economic Machinery Co*., 111 NLRB 947 (1955), type and found not to constitute a basis for upsetting the election. See also *Frito Lay, Inc.,* 341 NLRB 515 (2004) (use of "ride-alongs"─management representatives who rode with unit drivers to discuss working conditions─not objectionable).

Before leaving this line of cases, it should be explained that the Board has not drawn an analogy between home visitations by union representatives in the preelection period and home visitations by supervisors. "There is a substantial difference," the Board pointed out, "between the employment of the technique of individual interviews by employers on the one hand and by the union on the other. Unlike employers, unions often do not have the opportunity to address employees in assembled or informal groups, and never have the position of control over tenure of employment and working conditions which imparts the coercive effect to systematic individual interviews conducted by employers. Thus, not only do unions have more need to seek out individual employees to present their views, but, more important, lack the relationship with the employees to interfere with their choice of representatives thereby." *Plant City Welding*, supra at 133–134. See also *Teamsters Local 705 (K-Mart),* 347 NLRB 439 (2006).

24-322 Misrepresentation

378-2885

In 1982, the Board decided to abandon its policy of regulating misrepresentations in election campaigns. Thus, in *Midland National Life Insurance Co*., 263 NLRB 127, 130 (1982), the Board

held that it would "no longer probe into the truth or falsity of the parties' campaign statements." This decision ended the debate of many years as to what role the Board should take as to misleading campaign statements. Compare *Hollywood Ceramics*, 140 NLRB 222 (1962); and *Shopping Kart Food Market*, 228 NLRB 1311 (1977). In *Phoenix Mechanical*, 303 NLRB 888 (1991), a Board majority found no basis for setting aside elections on the basis of misrepresentations by third parties. Accord: *Carry Cos. of Illinois*, 310 NLRB 860 (1993); and *Nestle Dairy Systems*, 311 NLRB 987 (1993), enf. denied 46 F.3d 578 (6th Cir. 1995) (alleged misrepresentation by union in RICO lawsuit, not objectionable). See also *Gormac Custom Mfg*., 324 NLRB 423 (1997), and *Champaign Residential Services*, 325 NLRB 687 (1998) (union flyer with photocopied signatures of employees supporting the union).

The Sixth Circuit has a somewhat modified view of the Board's *Midland* policy. See *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984). The Board has continued to apply its *Midland* policy but will often analyze a case using the Sixth Circuit test where the case arises in that circuit. See, e.g., *UNISERV*, 340 NLRB 199 (2003); and *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2004).

Midland National did, however, indicate a continued Board concern over "forged documents which render the voters unable to recognize propaganda for what it is." Thus, if the deceptive manner used renders it unlikely that the voters will be able to assess the documents as forgeries, the Board will set aside the election. *Mt. Carmel Medical Center*, 306 NLRB 1060 (1992). See also *United Aircraft Corp*., 103 NLRB 102 (1953).

Similarly, the Board will set aside elections where Board documents are altered in a way that indicates Board endorsement of a party to the election. See *Allied Electric Products*, 109 NLRB 1270 (1954). For a complete discussion of the altered Board document policy in light of *Midland National Life Insurance Co*., 263 NLRB 127 (1982), see *Ryder Memorial Hospital,* 351 NLRB No. 26 (2007), and *SDC Investment*, 274 NLRB 556 (1985), and sections 24-423 and -441.

In *AWB Metal, Inc.*, 306 NLRB 109 (1992), the Board distinguished between a document that allegedly misrepresented wage rates and forgery. See also *Care Enterprises,* 306 NLRB 491 (1992). Compare *Riveredge Hospital*, 264 NLRB 1094 (1982), in which the Board applied the *Midland* rule to misrepresentations about Board actions. The Board distinguished *Riveredge* in a case involving a flyer saying that the NLRB wants workers to have a union. *TEG/LVI Environmental Services*, 326 NLRB 1469 (1998).

A misstatement of the law is not objectionable conduct. Thus, in *John W. Galbreath & Co*., 288 NLRB 876 (1988), the Board overruled objections to an election where an employer stated that an employee who is expelled from the union could be fired here is a union-security agreement in effect. Accord: *Seven-Up/Royal Crown Bottling Cos*., 323 NLRB 579 (1997). See also *Virginia Concrete Corp.,* 338 NLRB 1182 (2003).

See *Pacific Southwest Container*, 283 NLRB 79 (1987), in which the Board, distinguishing *Midland National* set aside an election because of confusion over the identity of the union. *Nevada Security Innovations,* 337 NLRB 1108 (2002).

24-323 Racial Appeals

378-2885-8000

Campaign propaganda calculated to inflame racial prejudice of employees, deliberately seeking to overemphasize and exacerbate racial feeling by irrevelant, inflammatory appeals, is a basis for setting aside an election. *Sewell Mfg. Co.,* 138 NLRB 66 (1962); and *YKK (USA) Inc*., 269 NLRB 82 (1984). For further background, see *P. D. Gwaltney, Jr., & Co*., 74 NLRB 371 (1947); *Bibb Mfg. Co*., 82 NLRB 338 (1949); *Empire Mfg. Corp*., 120 NLRB 1300, 1317 (1958); *Petroleum Carrier Corp*., 126 NLRB 1031 (1958); and cf. *Sharnay Hosiery Mills*, 120 NLRB 750 (1958). See also Sovern, *The National Labor Relations Board and Racial Discrimination*, 62 Columbia Law Review 563, 626 (1962).

This rule was applied in *Sewell Mfg*. in these factual circumstances.

An election was scheduled at two small Georgia towns. Two weeks before the election, the employer mailed to its employees a picture showing a closeup of an unidentified black man dancing with an unidentified white woman, and a caption underneath in bold letters: "The C.I.O. Strongly Pushes and Endorses the F.E.P.C." The employer included a reprint from a Mississippi newspaper with a picture captioned: *"Union Leader James B. Carey Dances With A Lady Friend,"* and a story headed: *"Race Mixing Is An Issue as Vickers Workers Ballot"* This mailing was followed by a letter calling attention to the union's support of NAACP and CORE. During the 4 months preceding the election, the employer distributed to its employees copies of "Militant Truth," a South Carolina monthly, containing statements of which the following is a fairly representative sampling: "It isn't in the interest of our wage earners to tie themselves to organizations that demand racial integration, socialistic legislation, and free range of communist conspirators." The Board concluded that the employer's propaganda directed to race "so inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility," and therefore overstepped the bounds of permissible campaigning by so lowering the standards that the uninhibited desires of the employees could not be determined in the election. The Board acknowledged that "standards must be high, but they cannot be that high that for practical purposes elections could not effectively be conducted." It continued, however, by stating that:

> [A]ppeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feeling of voters in the election.
>
> That is not to say that a relevant campaign statement is to be condemned because it may have racial overtones. [138 NLRB at 71.]

On the same day the Board decided *Sewell Mfg. Co*., 138 NLRB 66 (1962), case, it also decided *Allen-Morrison Sign Co*., 138 NLRB 73 (1962), which arose in another region and in which the injection of "the extraneous issue of race hatred" in the context of a Board election was also raised. In that case, the Board concluded that the employer's letter was "temperate in tone and advised the employees as to certain facts concerning union expenditures to help eliminate segregation," adding that it was "not able to say that the Employer in this case resorted to inflammatory propaganda on matters in no way related to the choice before the voters." The election was upheld. From both decisions the following standard for determination emerges.

So long as a party limits itself to setting forth truthfully another party's position on racial matters and does not deliberately seek to exacerbate racial feelings by irrelevant, inflammatory appeals, the election will stand, but the burden is on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against the party.

For example, the Board applied the *Sewell* rule where it found handbill references, which may have satisfied the standard of truthfulness, but were "irrelevant to any aspect of the IBEW's campaign." It also took into consideration the coupling of the irrelevant statement with a cartoon which appeared on the front page of the two area newspapers under the headline of an IBEW publication, depicting Blacks and Whites marching together with arms linked and carrying a banner entitled "We Shall Overcome." Captions under the cartoon read "Where did the above slogan originate?" and "Just a Reminder!" The Board concluded that the employees were inhibited by appeals to their sentiments as civic minded individuals, by the injection of the fear of personal economic loss, and by playing on racial prejudice, the full-page ads, the editorials, the cartoon, and the handbills were calculated to convince them that a vote for the union meant the betrayal of the community's best interests. While there was no evidence that the employer was responsible for this propaganda, the result achieved was nonetheless the same. *Universal Mfg.*

Corp., 156 NLRB 1459 (1966). The *Sewell* rule, as this case illustrates, is therefore also applicable where the objectionable conduct is engaged in by third parties. Compare *El Fenix Corp*., 234 NLRB 1212, 1213 (1978), where a single ethnic slur by an employee nonagent was not considered objectionable. See also *Benjamin Coal Co*., 294 NLRB 572 (1989), in which the Board found that the union was not responsible for the racial and ethnic statements of some of its committee members when the union discouraged such statements. See also *Brightview Care Center*, 292 NLRB 352 (1989), where isolated remarks by an unidentified employee were not objectionable; and *S. Lichtenberg & Co*., 296 NLRB 1302 (1989).

In *NLRB v. Schapiro & Whitehouse, Inc*., 356 F.2d 675 (4th Cir. 1966), the Fourth Circuit applied *Sewell* to union propaganda. The court found that campaign literature distributed by a union on two occasions shortly before a consent election which urged employees, most of whom were Blacks, to consider and act on race as a factor in the election was so irrelevant and inflammatory as to invalidate the election. In doing so, the court specifically approved the *Sewell* standards (at 679).

As in the case of employer inflammatory racial appeals (for example, *Allen-Morrison Sign Co*., 138 NLRB 73 (1962)), so in union inflammatory appeals, factual distinctions may call for a different result. Thus, while the theme in *Archer Laundry Co*., 150 NLRB 1427 (1965), was admittedly based on a racial issue, distinguishing implications were found. Instead of racial appeals designed to engender race hatred, the appeals in *Archer* were regarded as designed to engender "racial self-consciousness." For further discussion of the distinction between "consciouness raising" and racial prejudice see *NLRB v. Sumter Plywood*, 535 F.2d 917 (5th Cir. 1977), concerted action aimed at addressing themselves to the larger issue of the advantages and disadvantages of a union for the *Archer* laundry workers who were predominantly Black, and concerted action in the form of a union was another way by which the Blacks could strive to achieve equality in American society. The racial appeals in that context were therefore not considered irrelevant within the meaning of the criteria under discussion here. See also *Aristocrat Linen Supply Co*., 150 NLRB 1448 (1965); *Coca-Cola Bottling Co. of Memphis,* 273 NLRB 444 (1984); and *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458 (1998).

This distinction was also emphasized in another case in which the Board stressed the fact that in *Sewell* the campaign arguments were inflammatory in character, "setting race against race," an appeal to animosity rather than to consideration of "economic and social conditions and of possible actions to deal with them." This constrasts with the situation in which the union argument is not unreasonable, or irrelevant, or intemperately presented to the electorate. *Baltimore Luggage Co*., 162 NLRB 1230 (1967) (which includes a thorough rationale of the principles which govern this phase of the law). See also *Hobco Mfg. Co*., 164 NLRB 862 (1967).

Although in another case a racial appeal, as such, was not made in the preelection campaign, a rumor had been circulated throughout the plant 5 days before the election to the effect that the company's president had stated at a laundry association meeting that if the union lost the election he would discharge the Black employees. However, the Board found that the impact of the rumor was sufficiently neutralized and dissipated before the election by repeated disclaimers by both the union and the company. The union disassociated itself from the rumor and urged the employees to disregard it at two union meetings, and the company in oral denials and in a letter to all employees denounced the rumor as "poisonous." Thus, in the Board's view, the combined disclaimers were sufficient to transform it into the type of propaganda which the employees were capable of evaluating. *Staub Cleaners*, 171 NLRB 332 (1968). See also *Kresge-Newark, Inc*., 112 NLRB 869, 871 (1955).

The *Sewell* rule requires that race or ethnicity must be a significant and sustained aspect of the campaign for the Board to find objectionable conduct. In *Honeyville Grain, Inc. v. NLRB,* 444 F.3d 1269 (10th Cir. 2006), the court agreed with the Board that it was not. See also *Beatrice Grocery Products*, 287 NLRB 302 (1987); *Brightview Care Center*, 292 NLRB 352 (1989); *Zartic, Inc*., 315 NLRB 495 (1994); and *Dai-Ichi Hotel Saipan Beach*, supra. Compare

Catherine's, Inc., 316 NLRB 186 (1995). See also *Singer Co*., 191 NLRB 179 (1979) (limited remark found not objectionable).

The Board reached a similar result in *KI (USA) Corp*., 309 NLRB 1063 (1992), where in a divided opinion the Board found that the union's reproduction of letter from a Japanese official concerning American workers was not objectionable.

24-324 The *Excelsior* Rule

378-2878

a. Submission of the list

The *Excelsior* rule requires the employer to file with the Regional Director an election eligibility list containing the names and addresses of all eligible voters within 7 days after approval by the Regional Director of an election agreement or after a direction of election, and this information must be made available by the Regional Director to all parties in the election proceeding. *Excelsior Underwear*, 156 NLRB 1236 (1966). See also *J. P. Phillips, Inc.,* 336 NLRB 1279 (2001) (duty to send *Excelsior* list to the parties lies squarely with the Region).

In *Trustees of Columbia University,* 350 NLRB 574 (2007), the Board declined to require that the employer provide the e-mail addresses of the unit employees in compliance with the *Excelsior* rule. The Board majority stated that it was unwilling to extend *Excelsior* "without the benefit of amicus briefing and a fully developed record."

Compliance requires that the employer provide the *full* first and last name of the employees. *Laidlaw Waste Systems*, 321 NLRB 760 (1996); *North Macon Health Care Facility*, 315 NLRB 359 (1994); and *Weyerhaeuser Co*., 315 NLRB 963 (1994).

To be timely, the eligibility list must be received by the Regional Director within the required time; no extension of time is granted except in extraordinary circumstances. The filing of a petition for review does not stay this requirement. If the payroll period for eligibility purposes is subsequent to the election agreement or direction of election, the list must be filed within 7 days after the close of the determinative eligibility period. Failure to comply with this rule is deemed interference with the election and a ground, on proper objection, for invalidating the election.

Where the employer filed the list 11 days late without offering any reason for the delay other than that it was due to an "unintentional oversight," the Board held that the employer had not complied with the *Excelsior* requirement and set the election aside. *Rockwell Mfg. Co*., 201 NLRB 356 (1973). In doing so, it distinguished *U.S. Consumer Products*, 164 NLRB 1187 (1967), in which the delay was due to the parties' negotiations in attempting to resolve the representation issue so as to make the *Excelsior* list unnecessary. Compare also, *Taylor Publishing Co*., 167 NLRB 228 (1967), where the unit was large and the list only 1 day late. See also *Wedgewood Industries*, 243 NLRB 1190 (1979); and *Red Carpet Building Maintenance Corp*., 263 NLRB 1285 (1982). See also *Alcohol & Drug Dependency Services,* 326 NLRB 519 (1998).

More recently, the Board had occasion to discuss late filings of the list and reach different conclusions where the list was late and incomplete, *Special Citizens Futures Unlimited*, 331 NLRB 160 (2000) (election set aside), and where it was only 1 day late but was complete, *Bon Appetit Management Co*., 334 NLRB 1042 (2001) (election not set aside). See also *Mod Interiors*, 324 NLRB 164 (1997).

In *Teamsters Local 705 (K-Mart),* 347 NLRB 439 (2006), the Board overruled the objection of an RD petitioner who received the list 17 hours after the union.

Even in situations where the employer has fully complied with *Excelsior*, there may be a basis for rerunning the election because the touchstone is "the degree of prejudice to the channels of communication." See, e.g., *Avon Products*, 262 NLRB 46 (1982), in which a grant of a request for review expanded the unit and *Coca-Cola Co. Foods Division*, 202 NLRB 910 (1973), where the Regional Office misaddressed the envelope sending the list to the union. See also *American*

Laundry Machinery Division, 234 NLRB 630 (1978). Compare *Red Carpet Building Maintenance Corp*., 263 NLRB 1285 (1982). In *J. P. Phillips, Inc.*, supra, the Board found predjudice to one of the two unions because it received an incomplete copy from the Region.

The *Excelsior* rule applies to all election cases, including decertification and revocation of union-security authorization, consented to or directed, but it does not apply to expedited elections held pursuant to Section 8(b)(7)(C) of the Act. In *Gerland's Food Fair*, 272 NLRB 294 (1984), the Board set aside the election where the Regional Office failed to provide the RD petitioner with a copy of the list.

In adopting the *Excelsior* rule, the Board noted that disclosure under it will maximize the likelihood that all voters will be exposed to arguments for, as well as against, union representation; that it will permit the employees to make a more fully informed and reasoned choice; that it will tend to eliminate challenges to voters based solely on lack of knowledge of their identity; that many objections to elections will be settled well in advance of the election; and that the public interest will be furthered in obtaining more prompt resolutions of questions of representation.

In *Fenfrock Motor Sales*, 203 NLRB 541 (1973), the Board found that providing the *Excelsior* list to a third party under court order was not objectionable where there was no evidence that extensive questioning of employees before and after the election had an effect on employee free choice.

The *Excelsior* case was decided at the same time as *General Electric Co*., 161 NLRB 618 (1966); and *McCulloch Corp*., 156 NLRB 1247 (1966), in which it was urged that the Board should overrule *Livingston Shirt Corp*., 107 NLRB 400 (1954), and return to *Bonwit Teller, Inc*., 96 NLRB 608 (1951) (citation omitted). In *Bonwit Teller*, the Board held that, regardless of the breadth of an employer's no-solicitation rule, an antiunion speech on company time and premises, combined with a denial of a union request to reply, is a basis for setting aside a subsequent representation election and finding an unfair labor practice. In *General Electric* and *McCulloch*, supra at 1251, the Board declined to overrule *Livingston Shirt* and return to *Bonwit Teller*. The assumptions made on behalf of a policy change were not valid, said the Board, because under *Excelsior* in all elections, except an expedited election under Section 8(b)(7), all parties will have available to them, within a few days the names and addresses of all eligible voters.

b. Erroneous or incomplete lists

As noted earlier, compliance requires that the employer provide the *full* first and last name of the employees. *Laidlaw Waste Systems*, 321 NLRB 760 (1996), and an employer is estopped, absent unusual circumstances from relying on its own failure to comply with *Excelsior*. *George Washington University,* 346 NLRB 155 (2005).

In the period following the adoption of the *Excelsior* rule, the Board has had occasion to consider a variety of fact situations in which employers have made some attempt, but failed, to comply strictly with the requirements of that rule. In deciding whether the noncompliance was sufficient to warrant another election, the Board stated that there is "nothing in *Excelsior* which would require the rule stated therein to be mechanically applied." *Telonic Instruments*, 173 NLRB 588 (1969). See also *General Time Corp*., 195 NLRB 343 (1972); *Program Aids Co*., 163 NLRB 145 (1967); and *Thrifty Auto Parts*, 295 NLRB 1118 (1989).

Thus, although the submission of an inaccurate, incomplete, or late list may provide a basis for invalidating an election, it nonetheless depends on the specific factual circumstances. In *Telonic*, for example, the omissions were confined to 4 of about 111 eligible voters and the employer acted with alacrity in informing the Region and the union that the list was incomplete. The Board found substantial compliance with the rule. "Generally, the Board will not set an election aside because of an insubstantial failure to comply with the *Excelsior* rule if the employer has not been grossly negligent and has acted in good faith." *Lobster House*, 186 NLRB 148 (1970). See also *Fountainebleu Hotel Corp*., 181 NLRB 1134 (1970); *Gamble Robinson Co*.,

180 NLRB 532 (1970); *Program Aids Co*., supra; and *Valley Die Cast Corp*., 160 NLRB 1881 (1966). Where the employer obtained the addresses from W-4 forms but omitted one name because he thought the employee was not in the unit and left the name of another off because he was on temporary leave of absence and believed to be ineligible to vote, the Board held that these mistakes did not constitute gross negligence or indicate bad faith. *West Coast Meat Packing Co*., 195 NLRB 37 (1972). See also *Women in Crisis Counseling*, 312 NLRB 589 (1993), where a divided Board found the number of inaccuracies not to be substantial.

The Board takes more seriously the omission of names than inaccuracies in addressees. *Women in Crisis Counseling*, supra. See also *Washington Fruit & Produce Co.,* 343 NLRB 1215 (2004). This distinction is grounded in the fact that an employee's name provides "a key piece of information which can be used to identify and communicate with the person by means other than mail." *Women in Crisis Counseling*, supra at 589.

In *Washington Fruit & Produce Co.,* supra, the Board declined to set aside the election where the union was given a list that had inaccurate addresses for 28 percent of the unit. Because the union was able to obtain correct addresses from other souces for 90 percent of the unit, the Board, relying on *Women in Crisis Counseling,* supra, found substantial compliance with the *Excelsior* rule.

Note that even where the employer provides the union with the only addresses it has, it will be found to have been grossly negligent in supplying the list where it knew that many of its addresses were incorrect and, as a result, had even ceased mailing W-2 forms to its employees. *Merchants Transfer Co*., 330 NLRB 1165 (2000).

In *Meadow Valley Contractors*, 314 NLRB 217 (1994), the Board rejected an attempt to set a permissible omission rate of 9.5 percent. And in *Fountainview Care Center*, 323 NLRB 990 (1997), the Board concluded that an employer's decision not to exclude the names of a little more than 5 percent of the unit was not a good-faith mistake and was therefore not in substantial compliance with the *Excelsior* rule. The Board further noted that evidence of bad faith or gross negligence is not a required element in finding a failure to comply with *Excelsior* but either can be a relevant consideration.

In one unusual case the Board found noncompliance with *Excelsior* when the employer provided the union with a list that contained 81 names of ineligible voters in a unit of 146 employees. *Idaho Supreme Potatoes*, 218 NLRB 38 (1975).

In *Nathan's Famous of Yonkers*, 186 NLRB 131 (1970), an exception was made because of an unusual factual situation: The exception was grounded on the employer's flagrant unfair labor practices which were designed to defeat the winning union. There was no evidence that any union was prejudiced more than another by the withholding of the *Excelsior* list. It was therefore concluded that a literal application of the *Excelsior* rule would permit the employer to benefit from its illegal actions by providing it, with another opportunity to defeat the winning union. But, as the Board pointed out, this was an unusual situation. See also *Thiele Industries*, 325 NLRB 1122 (1998) (Board rejected employer objections based on its falure to provide *Excelsior* list).

Clearly, where the employer furnished a list which omitted the names and addresses of nearly half of the eligible voters, supplied a supplemental list itself deficient by the continued omission of the names and addresses of certain eligibles, and furnished it at a time when its use in the campaign was limited to only 6 days before the election, the election was invalidated. *Blue Onion*, 175 NLRB 9 (1969).

While the Board stated in *Telonic Instruments*, supra, that nothing in *Excelsior* would require a mechanical application of the rule, it stated later in *Ponce Television Corp*., 192 NLRB 115, 116 (1971), that it is not its policy "to vest the Employer with unlimited discretion with respect to the content of the eligibility list." Thus, elections were set aside where the employer omitted the names of five eligible employees from the list, as a failure of substantial compliance (*Sonfarrel, Inc*., 188 NLRB 969 (1971)); where 22 percent of the electorate was omitted from the list (*Ponce Television Corp*., supra); where more than 11 percent of the eligible voters had been omitted

(*Gamble Robinson Co*., supra); and where there had been a failure to supply addresses of employees in addition to names (*British Auto Parts*, 160 NLRB 239 (1966)). Compare *LeMaster Steel Erectors*, 271 NLRB 1391 (1984), where a deletion of 9 percent of the voters was held insufficient to set aside the election with *Thrifty Auto Parts*, supra, where 9.5 percent was considered sufficient. See also *Mod Interiors,* 324 NLRB 164 (1997), where the employer immediately corrected errors brought to its attention but the union did not have the fully corrected list for the full 10 days, and *Bear Truss, Inc*., 325 NLRB 1162 (1998), where the Board overruled objections finding that the employer acted in good faith in preparing and transmitting the list to the Region.

While the percentage of errors remains a factor in deciding *Excelsior* compliance matters, the Board in *Woodman's Food Markets*, 332 NLRB 503, 504–505 (2000), specifically eschewed the percentage of error as the only factor to be considered:

> We find that this approach—which focuses solely on the percentage of omissions relative to the number of employees in the unit—fails to adequately effectuate the purposes of the *Excelsior* rule. Accordingly, while we will continue to consider the percentage of omissions, we will consider other factors as well, including whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election, and the employer's explanation for the omissions.
>
> . . . .
>
> With respect to the employer's explanation for the omissions, we note that omissions may occur, notwithstanding an employer's reasonable good-faith efforts to comply, due to uncertainties about who is an eligible unit employee or other factors. Thus, we will consider the employer's explanation for the omissions.

It follows that, where the employer submitted no list at all, even though the union received only 8 out of the 215 ballots cast, the election should be set aside since "to make the election results the controlling factor in determining whether to excuse the lack of compliance with the rule subverts one of its very purposes, viz, 'to provide the Union [or unions as the case may be] with the opportunity to inform the employees of its position in order that the employees may intelligently exercise their right to vote.'" *Fuchs Baking Co*., 174 NLRB 720 (1969).

The issues of a union's actual access to employees, or the extent to which employees omitted from the *Excelsior* list are aware of the election issues and arguments, are not litigable matters in applying the *Excelsior* rule. *Sonfarrel, Inc.*, supra. "To look beyond the question of substantial completeness of the lists," said the Board in that case, "and into the further question of whether employees were actually 'informed' about the election issues despite their omission from the list, would spawn an administrative monstrosity."

The Board has rejected the contention that the petitioner did not need the list and therefore was not entitled to a complete and correct one. *Rite-Care Poultry Co*., 185 NLRB 41 (1970). This was discussed in detail in *Murphy Bonded Warehouse*, 180 NLRB 463 (1970), in which the Board affirmed a hearing officer's ruling at the initial representation case hearing, declining to permit an inquiry concerning the necessity of requiring submission of the list.

In invalidating the election in *Rite-Care*, the Board distinguished its rulings in *Singer Co*., 175 NLRB 211 (1969), and in *Telonic Instruments*, supra, in which it upheld the elections. In *Singer*, the list provided only surname and forename initials, and other inadvertent omissions but had correct addresses, and in *Telonic* the employer had inadvertently omitted four eligibles, but supplied them before the election.

Procedural note: In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the United States Supreme Court upheld the substantive validity of the *Excelsior* rule, stating that the "objections that the respondent raises to the requirement of disclosure were clearly and correctly answered by the Board in its *Excelsior* decision." Thus, as in *Wyman-Gordon*, the employer himself is

specifically directed by the Board to submit a list of names and addresses of his employees for use by the union in connection with the election, this direction is "unquestionably valid." The Court held further, however, that, insofar as the Board purported to promulgate a new rule applicable to future cases, it violated the rulemaking processes of the Administrative Procedure Act.

After the Supreme Court's decision in *Wyman-Gordon*, a case arose in which the employer argued that the parties by executing an election agreement waived an "adjudicatory proceeding" pursuant to which the *Excelsior* list may be validly directed. But the Board, rejecting this contention, explained that the election agreements expedite elections by obviating the need for formal hearings and directions of election. The parties' waiver of these statutory requirements is itself statutorily permitted by Section 9(c)(4) of the Act and does not render inapplicable other statutory obligations and Board policies, "nor does it denude the representation proceeding of its adjudicatory nature." *Formfit Rogers Co. v. NLRB*, 71 LRRM 2456 (D.C.Tenn. 1969). Thus, where an election agreement is involved, the procedure is essentially similar to that followed in *NLRB v. Wyman-Gordon Co*., supra, except that the parties are able to stipulate to certain facts and execute an election agreement instead of pursuing the more formal route to a direction of election. As in *Wyman-Gordon*, the employer is specifically directed to furnish the *Excelsior* list. The fact that the direction is made by a Regional Director in a separate letter accompanying the copy of the agreement does not make the direction less valid. "To hold otherwise," concluded the Board, "would be to invite unnecessary litigation in situations where the parties would otherwise stipulate to the relevant facts." *Bishop-Hansel Ford Sales*, 180 NLRB 987 (1970).

See also section 23-510.

24-325 The *Peerless* Rule

378-2100

378-4242

378-8420

378-8480

a. Speeches

The *Peerless Plywood* rule, applicable to employers and unions alike, forbids election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for an election. Violation of this prohibition is a ground for setting aside the election whenever valid objections are filed. *Peerless Plywood Co*., 107 NLRB 427, 429 (1954).

"Such a speech," said the Board in its rationale, "because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word." The Board adverted to its longstanding rule prohibiting electioneering by either party at or near the polling place. "We have previously prescribed space limitations," said the Board, "now we prescribe time limitations as well."

The *Peerless Plywood* rule was held inapplicable in the case of a casual solicitation of three employees, only one of whom was eligible to vote, the night before the election by a union agent. This, said the Board, cannot be characterized as a "speech" to a "massed assembly of employees." "That rule was not intended to nor, in our opinion, does it prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." The election was sustained. *Business Aviation, Inc*., 202 NLRB 1025 (1973). See also *Electro Wire Products*, 242 NLRB 960 (1979), where the employer president spoke individually to each employee on the day of the election asking them to vote "no"; *Associated Milk Producers*, 237 NLRB 879 (1978), and *Comcast Cablevision of New Haven*, 325 NLRB 833 (1998) (brief remarks by union to a noncaptive audience did not violate rule). Neither does distribution of

propaganda with paychecks immediately before the election fall within the prohibition of the rule. *Conroe Creosoting Co*., 149 NLRB 1174 (1964). Where an election extends over 2 days, with employees voting at separate sites, the rule requires only that no speeches be given on company time to massed assemblies of employees who are scheduled to vote within 24 hours. Thus, where there was no evidence of any speech made to employees at one site within 24 hours of the scheduled polling time for the employees at that site, the election was upheld. *Shop Rite Foods*, 195 NLRB 133 (1972). See also *Dixie Drive-It-Yourself System Nashville Co*., 120 NLRB 1608 (1958).

This rule does not interfere with the rights of unions and employers to circulate campaign literature on or off the premises at any time prior to an election (see *General Electric Co*., 161 NLRB 618 (1966), and *Andel Jewelry Corp.*, 326 NLRB 507 (1998)), nor does it prohibit the use of any other legitimate campaign propaganda or media. It forbids speeches, whether coercive or not (see *Excelsior Laundry Co*., 186 NLRB 914 (1970)), during the prescribed 24-hour period on company time and property, but it does not "prohibit an employer from making (without granting the union an opportunity to reply) campaign speeches on company time prior to the 24-hour period, provided, of course, such speeches are not otherwise violative of Section 8(a)(1)." The Board added that the rule does not prohibit employers and unions from making campaign speeches on or off company premises during the 24-hour period "if employee attendance is voluntary and on the employees' own time." *Peerless Plywood Co*., .supra at 430. See also *Nebraska Consolidated Mills*, 165 NLRB 639 (1967).

The rule can be violated by the use of sound trucks, broadcasting short messages or union songs to employees during a change in shifts. *U.S. Gypsum Co*., 115 NLRB 734 (1956). See also *Purolite*, 330 NLRB 37 (1999), overruling *Bro-Tech Corp*., 315 NLRB 1014 (1994), where the Board found that broadcast of union songs from a sound truck was not conduct proscribed by the *Peerless* rule.

The *Peerless Plywood* rule is not limited to "a formal speech in the usual sense," but is designed to bar, for example, a question and answer session. *Montgomery Ward & Co*., 124 NLRB 343, 344 (1959). "Massed assemblies," as used in *Peerless Plywood*, is not to be construed as limited to all or most of the unit employees, or to any certain percentage of them, or to an assemblage of such employees whose votes would be sufficient in number to affect the outcome of the election. *Great Atlantic & Pacific Tea Co*., 111 NLRB 623, 625–626 (1955). See also *Honeywell, Inc*., 162 NLRB 323 (1967), where the fact that only one section of the employees was involved was no warrant for an exception, nor that a relatively small percentage of employees constituted the "captive audience." Compare *Business Aviation Inc*., supra.

Where on the day before the election, company representatives addressed meetings of employees on all three shifts in the production areas of the plant during working time, and, although purportedly called for the purpose of advising employees that the election would not be postponed as told the employees in a prior letter, they nonetheless engaged in campaign speeches expressing opposition to the union, the *Peerless Plywood* rule was held violated. *Mallory Capacitator Co*., 167 NLRB 647 (1967). But it was not breached where a speech or discussion 3 hours before the election by union representatives started on the employees' own time, was extemporaneous, was voluntarily attended with no member of management present, and at best ran over into company time for no more than approximately 5 minutes. *Nebraska Consolidated Mills*, supra.

A more unusual situation was presented where meetings were called on company time with 150 to 200 employees in attendance within 24 hours of the election and, although the meetings were antipetitioner in tenor, the petitioner won the election despite the meetings. The Board cited *Showell Poultry Co*., 105 NLRB 580 (1953), and applied the rationale of that case which was that the Board will not set aside an election because of employer interference where the only union involved wins the election, because to do so would permit the wrongdoer to profit by its illegal acts. To uphold the objection of the intervenor would not only not effectuate the purposes of the

Peerless Plywood Co., 107 NLRB 427 (1954), rule but would invite "collusion in future cases" by suggesting "to any employer who favors one competing union whose chances in the election do not appear to be bright, deliberately to violate the *Peerless Plywood* rule in the assurance that the favored minority union can successfully file objections and be given a second opportunity to woo the voters." *Packerland Packing Co*., 185 NLRB 653 (1970). See also *Flat River Glass Co*., 234 NLRB 1307 (1978).

A speech otherwise permissible by *Peerless* was found objectionable because the employees were required to attend without full compensation and without receiving their regular paychecks until after the meeting. *Comet Electric*, 314 NLRB 1215 (1994).

A prounion poster affixed to a tree not visible from the property site was found not to be a *Peerless* violation. *American Medical Response*, 339 NLRB 23 (2003). Similarly, a text message sent to drivers in their trucks was not found to violate the *Peerless* rule. *Virginia Concrete Corp.*, 338 NLRB 1182 (2003).

b. Peerless and mail-ballot elections

Where an election is conducted by mail, the Regional Director must give all parties 24 hours' notice of the date when the ballots are to be mailed. Employers and unions alike are prohibited from making speeches on company time to massed assemblies from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return. *Oregon Washington Telephone Co*., 123 NLRB 339 (1959); and *San Diego Gas & Electric*, 325 NLRB 1143 (1998). See also *Interstate Hosts*, 130 NLRB 1614 (1961). In *American Red Cross Blood Services*, 322 NLRB 401 (1996), the Board set aside an election where the employer gave two speeches after the Regional Office had mailed the mail ballots. The Board rejected the employer's defense that the Region had failed to notify the parties of the time and date of mailing. In doing so, the Board noted that that information was contained in the stipulated election agreement.

c. Peerless and paychecks

In *Kalin Construction Co*., 321 NLRB 649 (1996), a divided Board applied the 24-hour rule to prohibit any changes in the paycheck process during this period. In the view of the majority, a paycheck

> cannot be equated to an ordinary piece of campaign literature exempt from the *Peerless Plywood rule*. An employee's paycheck is a singular document.

Accord: *United Cerebral Palsy Assn. of Niagara County,* 327 NLRB 40 (1998). See *Chicagoland Television News*, 328 NLRB 367 (1999), distinguishing a nonelectioneering party from the *Kalin* rule.

24-326 Third-Party Conduct

378-1401

378-5625-6700

378-7000

712-5014-0190

Generally, the Board applies the common law principles of Agency including principles of apparent and actual authority in determining responsibility for misconduct. *Mar-Jam Supply Co.*, 337 NLRB 337 (2001); *Cooper Industries*, 328 NLRB 145 (1999); and *Fieldcrest Cannon, Inc*., 318 NLRB 470 (1995). See also *Culinary Foods, Inc*., 325 NLRB 664 (1998). See *Cornell Forge Co.,* 339 NLRB 733 (2003), for a summary of agency law as it relates to unit employees as agents of the union.

Elections, however, are not only invalidated because of the conduct of the parties and their agents but also because of third-party conduct which interferes with the right of employees to a free and uninhibited choice in the selection of a bargaining representative to such extent that it

renders "a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *U.S. Electrical Motors*, 261 NLRB 1343 (1982); *Phoenix Mechanical*, 303 NLRB 888 (1991); and *O'Brien Memorial*, 310 NLRB 943 (1993). See also *Lamar Advertising of Janesville*, 340 NLRB 979 (2003); and *Duralam, Inc*., 284 NLRB 1419 (1987).

Note: For analyses of third electioneering viz, conduct at or around the polls, see The *Milchem* Rule 24-442, infra. (*Milchem, Inc*., 170 NLRB 362 (1968).

For a discussion of racially or ethnically derogatory remarks by third parties, see *M & M Supermarket v. NLRB*, 818 F.2d 1567 (11th Cir. 1987).

a. Nature of conduct

The Board set out the standards for assessing the nature of third-party conduct in its *Westwood Horizons Hotel* decision, 270 NLRB 802 (1984). More recently it repeated those standards in *PPG Industries,* 350 NLRB 225 (2007):

> In assessing the seriousness of such threats, the Board considers (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was "rejuvenated" at or near the time of the election.

One of the earliest cases to establish these principles was *P. D. Gwaltney, Jr*., & Co., 74 NLRB 371 (1947). In that case, the Board enunciated fully its rationale. It pointed out that a representation proceeding is in effect an investigation to ascertain employee wishes concerning their choice of a bargaining representative. For this reason, in appraising the facts and determining the Board's duty in this context, more is involved than the mere determination of whether or not the employer was responsible for the antiunion conduct which immediately preceded the election. Rather, the issue before the Board is whether the election was held in an atmosphere conducive to the kind of free and untrammeled choice contemplated by the Act. *Cal-West Periodicals,* 330 NLRB 599 (2000), citing *Westwood Horizons Hotel*, supra. See also *Robert Orr–Sysco Food Services,* 338 NLRB 614 (2002); and *Associated Rubber Co*., 332 NLRB 1588 (2000). And as the Board stated in a later case: "The election was held in such a general atmosphere of confusion and fear of reprisal as to render impossible the rational, uncoerced selection of a bargaining representative. It is not material that the fear and disorder may have been created by individual employees and nonemployees and that their conduct cannot be attributed either to the Employer or to the unions. The important fact is that such conditions existed and that a free election was thereby rendered impossible." *Diamond State Poultry Co*., 107 NLRB 3, 6 (1954). See also *Rheem Mfg. Co*., 309 NLRB 459 (1992), which overruled an objection based on one employee campaigning outside the polls distinguishing *Pepsi-Cola Bottling Co*., 291 NLRB 578 (1988). *Lamar Advertising of Janesville*, supra. Compare *Q. B. Rebuilders*, 312 NLRB 1141 (1993), where the Board found a sufficient level of fear to set aside the election based on a third-party (employee) threat to call the INS to report any employee who voted against the union. For a discussion of third-party conduct where the Board did not set the election aside because of alleged confusion rather than fear, see *Phoenix Mechanical*, 303 NLRB 888 (1991); *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231 fn. 1 (1999); *Stannah Stairlifts, Inc*., 325 NLRB 572 fn. 2 (1998); and *Culinary Foods, Inc*., supra.

The Second Circuit punctuated the principle here under consideration by pointing out that certain elements, regardless of their course, may make an impartial choice impossible, thus invalidating an election. *NLRB v. Staub Cleaners*, 357 F.2d 1 (2d Cir. 1966).

"Realistically speaking, and in order to near if not arrive at the highly desired laboratory conditions for an election, this is the most workable approach. Parties to an election and their well wishers are thus put on notice that prohibited conduct engaged in by anyone may forfeit an

election. This then will serve to put a premium on proper deportment by all parties." *Teamsters Local 980 (Landis Morgan)*, 177 NLRB 579, 584 (1969).

In *Dean Industries*, 162 NLRB 1078 (1967), the company was not held responsible for certain of the conduct alleged as unfair labor practices by reason of activities on the part of persons not in its employ or management whom it did not clothe with the apparent authority to act for it. At the minimum, the employer must have acquired knowledge of the activities for which it is sought to be charged and the circumstances must have been such as to place the employer under an obligation to disavow said activities (at 1093). Nonetheless, it was concluded that much of the antiunion activities engaged in by the townspeople—spelled out in some detail in the decision—rendered impossible the rational, uncoerced selection of a bargaining representative. See also *James Lees & Sons, Co*., 130 NLRB 290 (1961).

The dichotomy between responsibility on the part of a party as a necessary element in an unfair labor practice finding and third party conduct as a ground for invalidating an election, even if the activities of the third party cannot be attributed to an actual party, was considered in *Louisburg Sportswear Co*., 173 NLRB 678, 693 (1969). Even if the activities by the local citizenry were not attributed to the company, the election held in the face of conduct of outside persons required setting the election aside. Where, of course, responsibility on the part of a party is established, as in *General Metal Products Co*., 164 NLRB 64 (1967), the outside individuals having acted "on behalf and in the interest of the Respondent with the latter's knowledge and approval," no distinction exists between the finding in the complaint case and the result in the objections case. See also *Colson Corp. v. NLRB*, 347 F.2d 128, 137 (8th Cir. 1965).

Third-party conduct becomes actionable not only as a basis for objections filed by unions but also for those filed by employers where the latter allege conduct rendering impossible a rational, uncoerced choice in a Board election. For example: An election was conducted in the face of an often violent and emotion-filled strike. Events occurring during the critical period (between the filing of the petition and the election) included extensive property destruction, anonymous telephone threats to eligible voters, the report of a bomb threat and subsequent police investigation which compelled the automobile dealership to close down on the Saturday preceding the election, and apparently unruly conduct on the picket line which resulted in the stationing of full-time police and a police car in front of the dealership. The Board concluded that the election was held in an atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, and to prevent an uncoerced choice. The Board added: "It is not material that fear and disorder may have been created by individual employees or nonemployees and that their conduct cannot probatively be attributed either to the Employer or to the Union. The significant fact is that such conditions existed and that a free election was thereby rendered impossible." *Al Long, Inc*., 173 NLRB 447, 448 (1969).

b. Who is a third party

"Third parties," a survey of this category of cases shows, include members of the community (*James Lees & Sons Co*., 130 NLRB 290 (1961)); the mayor of the city (*Kelsey-Hayes Co*., 145 NLRB 1717 (1964)); citizens' committees (*Myrna Mills*, 133 NLRB 767 (1961)); members of the police force (*Great Atlantic & Pacific Tea Co*., 120 NLRB 765 (1958)); employees or nonemployees (*Cal-West Periodicals,* supra; *Associated Rubber Co.*, supra; *Al Long, Inc.*, supra). Compare *Culinary Foods*, supra; *Windsor House C & D*, 309 NLRB 693 (1992); and *Q. B. Rebuilders*, supra; employees from neighboring plants (*Diamond State Poultry Co*., 107 NLRB 3 (1954)); banks (*Kelsey-Hayes Co.*, supra); community leaders (*Dean Industries*, 162 NLRB 1078 (1967)); businessmen (*Benson Veneer Co*., 156 NLRB 781 (1966); editors (*Universal Mfg. Corp*., 156 NLRB 1459 (1966)); chief of police (*Lifetime Door Co*., 158 NLRB 13 (1966)); and industrial advisory committee (*Proctor-Silex Corp*., 159 NLRB 598 (1966)).

For an interesting third-party case involving a State government official and the issue of whether the voters were confused, see *Columbia Tanning Corp*., 238 NLRB 899 (1978). Compare *Ursery Cos*., 311 NLRB 399 (1993); *Saint-Gobain Abrasives, Inc.,* 337 NLRB 82 (2001); and *Chipman Union, Inc*., 316 NLRB 107 (1995) (letter from U.S. Congressman not objectionable). See also *Trump Plaza Hotel & Casino,* 352 NLRB No. 71 (2008).

The conduct of prounion employees who have no actual or apparent authority to act for the union is evaluated under third-party conduct standard. *Corner Furniture Discount Center*, 339 NLRB 1122 (2003). For a discussion of in-plant organizers as agents or as third parties, see *Cornell Forge Co.*, supra. See also *Tyson Fresh Meats, Inc.,* 343 NLRB 1335 (2004) (union stewards found to be agents with actual and apparent authority).

The arrest of the union's principal organizer in the presence of a number of eligible voters only minutes before they were scheduled to vote served as a meritorious objection to the election. *Great Atlantic & Pacific Tea Co*., 120 NLRB 765 (1958). But the mere presence of police during an election does not warrant its invalidation where it appeared that the police did not speak to any of the voters. *Vita Food Products*, 116 NLRB 1215, 1219 (1957).

While, as has been reiterated above, conduct not attributable to either party to an election may be grounds for setting the election aside, the Board has held that it "accords less weight to such conduct than to conduct of the parties." *Orleans Mfg. Co*., 120 NLRB 630, 633 (1958); and *Dunham's Athleisure Corp*., 315 NLRB 689 (1994). The explanation for this is that the Board believes that the conduct of third parties tends to have less effect upon the voters than similar conduct attributable to the employer who has, or the union which seeks, control over the employees' working conditions. See *Ottenbacher Mfg*., 279 NLRB 1167 (1986).

In *Bells Trans*, 297 NLRB 280 (1989), the Board overruled objections based on a third-party threat. In doing so, it distinguished both the nature of the threat and the frequency from those in *Picoma Industries*, 296 NLRB 498 (1989).

In *Cross Baking Co*., 191 NLRB 27 (1971), despite an employee's conduct consisting of alleged "threats to and assault upon members of the electorate" and alleged assaults, the Board found that this conduct was too remote in time from the election, which was conducted 2 months later, to warrant upsetting the election on the ground of atmosphere of fear. The Board cited *Orleans*, supra, and distinguished *Diamond State Poultry Co*., 107 NLRB 3 (1954), in that in *Diamond* the threats were made on the day of the election. The First Circuit agreed with the Board's ultimate conclusion on this issue in view of the Board's finding that the employee was discharged shortly after the assault, did not return to the plant, and there were no further incidents during the 2 months remaining before the election. But the court disagreed with some of the Board's reasoning, emphasizing that the question was not the culpability of the union but whether an atmosphere of fear and coercion was created, as that "fear would be less effective if it had an unofficial origin." *Cross Baking Co. v. NLRB*, 453 F.2d 1436 (1st Cir. 1971).

To like effect, see *Owens-Corning Fiberglas Corp*., 179 NLRB 219, 223 (1969). While recognizing that some heated statements may be made by individual employees and that such conduct should be considered in determining whether employees were precluded from exercising a free choice, even absent employer or union responsibility, consideration should be given as to whether the conduct complained of was committed by the parties as distinguished from third persons, as conduct by the latter "tends to have less effect." See also *Lamar Advertising of Janesville*, 340 NLRB 979 (2003).

In this connection, in *Foremost Dairies of the South*, 172 NLRB 1242 (1968), the Board, on remand from the Fifth Circuit (*Home Town Foods, Inc. v. NLRB,* 379 F.2d 241 (1967)), interpreted the court's opinion "as dispensing with a showing of responsibility by one of the parties only where the conduct involved is of so serious a nature that it could only result in widespread confusion and fear of reprisal which would render impossible a rational, uncoerced choice by employees." In *Foremost Dairies*, the Board found (at 1247) that the incidents which exceeded permissible bounds were merely three, "of which all were very limited in nature and

only one was known to two other employees." Compare *Crown Coach Corp*., 284 NLRB 1010 (1987), where threats of deportation by fellow employees warranted setting the election aside.

In *Monroe Auto Equipment Co*., 186 NLRB 90 (1970), on remand from the Fifth Circuit, the Board referred to *Foremost Dairies* (379 F.2d 241 (1967)), and summarized "as the law of the case" the frame of reference laid down by the court, as follows: (1) consideration of the objections or incidents cumulatively rather than as isolated individual incidents; (2) consideration, in addition to the objective evaluation normally employed, of subjective evidence of fear and coercion in determining whether interference sufficient to warrant setting aside the election occurred; and (3) a determination not only whether the conduct complained of was coercive but also whether it was so related to the election as to have a probable effect on the employees' actions at the polls or created an environment of tension so as to preclude employees from exercising free choice. See *NLRB v. Monroe Auto Equipment Co.*, 406 F.2d 177 (5th Cir. 1969); and *Foremost Dairies* of the *Foremost Dairies of the South v. NLRB*, 416 F.2d 392 (5th Cir. 1969). Among the facts the Board examines in analyzing threats not attributable to a party is the person making the threats to carry them out. See *Bell Security*, 308 NLRB 80 (1992). See also *Lamar Advertising of Janesville,* supra.

Spirited campaigning, "far from constituting unlawful interference with the Board's election processes, may produce a more informed polarization of employee sentiment and therefore constitute a more accurate gauge of employees' true representation desires." *Emerson Electric Co*., 177 NLRB 75, 100 (1969). In that case, a plant unionization effort met with active opposition by other employees in the form of an "Emerson Royal Employees Club." It was not ascribable to the employer, not found improper as such, and, in the circumstances, the employer was under no obligation to disavow it or any association with it.

c. Disavowal

In terms of the necessity for "disavowal," the Board has held that an employer is not necessarily under a duty to disavow a preelection statement by an employee. *American Molded Products Co*., 134 NLRB 1446, 1448 (1962); see also *Northrop Aircraft*, 106 NLRB 23, 25 (1953). In like vein, the conduct of rank-and-file employees is not generally imputed to their organization unless there is ratification. As a rule, it is considered in the same way as conduct of a third party. But a union is held accountable for statements of its committeemen when the latter are the responsible representatives of the union in the plant and play a central role in the election campaign. *Vickers, Inc*., 152 NLRB 793 (1965). Compare *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984), with *United Builders Supply Co*., 287 NLRB 1364 (1988). Conduct of union activists is not per se imputed to the union. See *Advance Products Corp*., 304 NLRB 436 (1991); and *Crestwood Convalescent Hospital*, 316 NLRB 1057 (1995). For example of conduct by a nonemployee who was not found to have apparent authority, see *Midland Processing Services*, 304 NLRB 770 (1991); and *Cornell Forge Co.*, 339 NLRB 733 (2003).

Third-party conduct which is otherwise actionable, it should be made clear, may be neutralized by an employer's specific public disavowal. For example: News stories and a statement by a development group which leased space to the employer had suggested that the firm might move if the union won the election. Nonetheless, "the Employer's specific public disavowals of any intention to relocate, coupled with the Petitioner's republication and distribution to employees of such disavowals, tended to neutralize any atmosphere of fear and confusion that otherwise might have been engendered" by third-party (the development group) conduct. *Electra Mfg. Co*., 148 NLRB 494 (1964). See also *Bristol Textile Co*., 277 NLRB 1637 (1986).

Similar preelection activity was found not to have interfered with the election in the light of the give-and-take of the campaign, the employer's disavowal of rumors about the plant's closing, the absence of any showing by the petitioner that it was dissatisfied with the disavowal, and the employer's "straight-forward assurance" to the employees that it had dealt fairly with them,

hoped to do better, and intended to keep the plant going regardless of the outcome of the election. *Claymore Mfg. Co. of Arkansas*, 146 NLRB 1400 (1964).

d. Rumors

On the subject of "rumor," the Board, in *General Housing Industries*, 197 NLRB 24 (1972), found that in that case the rumors stood "revealed to the employees as nothing more than election propaganda," and the various rumors neutralized and dissipated the possible coercive effect of the others. So, too, in *Staub Cleaners*, 171 NLRB 332, 333 (1968), the various statements by both the union and the respondent were sufficient to "neutralize and dissipate the rumor's coercive edge." The Board took into consideration the possibility that by repeating the rumor the respondent would spread it or misquote it, and thereby start a new rumor; it was therefore unnecessary for the respondent to risk quoting the rumor in order to deny it.

It is apparent, of course, that these cases we have been discussing turn on their particular facts, not on legal niceties. Thus, third party conduct not attributable to the petitioner, but actually attributed by the employees to former employees who had previously been discharged, could not possibly have had any coercive or disruptive effect on the election. *ITT Consumer Services Corp*., 202 NLRB 65 (1973).

See also *Englewood Hospital*, 318 NLRB 806 (1995), where a divided Board found unobjectionable an employer's reference to and denunciation of an anonymous bigoted letter. The Board majority found that the employer's conduct "did not rise to the level of a sustained appeal to racial prejudice of the type condemned in *Sewell* and its progeny."

e. Unidentified wrongdoers

On occasion the Board will not be able to identify the persons engaging in misconduct. In those circumstances, the Board will not routinely set aside the election until there is final tally. The reason for this policy is that the Board does not wish to benefit the wrongdoers in circumstances where the election was not in their favor. See *Pine Shores, Inc*., 321 NLRB 1437 (1996).

See also 24-442. The *Milchem* Rule for discussion of party electioneering conduct as objectionable.

24-327 Offers to Waive Union Initiation Fees

378-4270-6705

378-4284-5000

712-5042-6767

In 1973, the Supreme Court ruled that a union's offer to waive initiation fees can be grounds for setting aside an election. Such a waiver is objectionable if it is limited to employees who sign a union authorization card before the election. Where, however, the offer is not so limited and is also available to those who sign up after the election, such an offer would not be objectionable. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *L. D. McFarland Co*., 219 NLRB 575 (1975); and *Lau Industries*, 210 NLRB 182 (1974).

It is not objectionable conduct for a union to advise employees that if the union is voted in, they will continue to have an opportunity at the waiver or that employees who have paid initiation fees at other places of employment, do not have to pay again. *De Jana Industries*, 305 NLRB 294 (1991). Rather, *Savair* requires that objectionable conduct is that which requires an "outward manifestation of support" such as signing an authorization card or joining the union. Compare *Nu Skin International*, 307 NLRB 223 (1992), in which the Board found *Savair* inapplicable to the union's distribution of T-shirts conditioned on signing of a prounion petition.

Where the union's offer is ambiguous, the doubt will be resolved against the union and the statement may be held objectionable. *S.T.A.R., Inc.,* 347 NLRB 82 (2006); *Smith & Co. of California*, 266 NLRB 172 (1983); and *Town & Country Cadillac*, 266 NLRB 172 (1983).

Remarks of employee solicitors as to waiver may be attributable to the union and thus become the basis for election objections. When a union makes authorization cards available to employees as solicitors and does not publicly disavow these solicitors as agents, the union will be deemed to have authorized "a special agency relationship for the limited purpose of card solicitation." *University Towers*, 285 NLRB 199 (1987); and *Davlan Engineering*, 283 NLRB 803 (1987).

In *Hollingsworth Management Service*, 342 NLRB 556, 559 (2004), the Board repeated the "safe harbor" provisions for its *Davlan* policy:

> [A] union may avoid responsibility for the improper fee-waiver statements of its solicitors . . . by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards. Such publicity may take any number of forms including, for example, an explanation of the fee-waiver policy printed on the authorization card itself." [*Davlan,* supra at 805.]

In a somewhat related case, the Board concluded that a union's promise of a card which would make employees eligible for referral from the hiring hall was not objectionable because there was no showing that the employees were not otherwise qualified to receive the referral card. *Electrical Workers Local 103 (Drew Electric)*, 312 NLRB 591 (1993).

24-328 Prounion Supervisory Conduct

378-2889

Efforts of supervisors on behalf of the union may be objectionable. In *Harborside Healthcare, Inc.,* 343 NLRB 906, 909 (2004), the Board majority stated its two part test for assessing objectionable conduct:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
>
> This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

The alleged objectionable conduct by a supervisor in *Harborside* included prediction of job loss, advising employees that they had to attend union meetings, and soliciting employees to sign union authorization cards. In finding the solicitation objectionable, the Board noted the solicitation of a signature is more than speech. Rather it places employees in a situation where they could be reasonably concerned about giving the "right" or "wrong" response to their supervisors. Thus, the Board overruled *Millsboro Nursing & Rehabilitation Center,* 327 NLRB 879, 880 (1999), on this point.

The Board's *Harborside* decision holds that the employer's antiunion stance continues to be part of its test and may "mitigate the coercive effect of impermissible prounion supervisory conduct."

The Board majority also noted that recent cases that suggest that prounion supervisory conduct is not objectionable unless it involves a threat or promise, "represent a departure from established precedent."

The Board applied *Harborside* to set aside elections in *Madison Square Garden, Ct., LLC,* 350 NLRB 117 (2007), and *SNE Enterprises,* 248 NLRB 1041 (2006). It overruled *Harborside*

objections in two other cases, *Fidelity Healthcare & Rehab Center,* 349 NLRB No. 120 (2007), and *Northeast Iowa Telephone Co.,* 346 NLRB 465 (2006).

Supervisory solicitation is not objectionable where the soliciting supervisor has no authority over the employee being solicited, *Glen's Market,* 344 NLRB 294 (2005).

24-329 Videotaping

378-4263

a. *Employer taping*

Absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1) of the Act. *F. W. Woolworth Co*., 310 NLRB 1197, 1197 (1993); *Saia Motor Freight Line,* 333 NLRB 784, 785 (2001), and constitutes objectionable conduct, *Mercy General Hospital*, 334 NLRB 100, 104–105 (2001). These rules apply not only where a videotape is shot with a handheld camera, but also where the videotape is created with a rotatable security camera purposefully directed at protected concerted activity. See, e.g., *Mercy General Hospital*, supra; and *U.S. Ecology Corp*., 331 NLRB 223, 233 (2000). At the same time, however, the Board "recognize[s] that an employer has the right to maintain security measures necessary to the furtherance of legitimate business during the course of union activity." *National Steel & Shipbuilding Co.,* 324 NLRB 499, 501 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). Thus, it is neither unlawful nor objectionable when a rotatable security camera, operating in its customary manner, happens to record protected concerted activity on videotape. Cf. *Mercy General Hospital*, supra at 105 (finding no justificaton for videotaping where direction security camera was pointing "did not result from the established way in which the camera was operating"). *Frontier Hotel & Casino*, 323 NLRB 815, 837 (1997) (finding no justification for videotaping where security camera focused on union activity and did not rotate to scan parking lot "as was customarily the case").

In *Saia Motor Freight Line*, supra, the Board accepted an employer's concern about traffic safety as a legitimate justification for photographing employees engaged in handbilling. But in *Robert Orr-Sysco Food Services*, 334 NLRB 977 (2001), the Board distinguished *Saia* finding no such justification.

b. Union taping

In *Randell Warehouse of Arizona,* 328 NLRB 1034 (1999), the Board found that union videotaping of the distribution of literature to employees as they accepted or rejected the literature is not objectionable. In doing, so, a divided Board overruled *Pepsi-Cola Bottling Co*., 289 NLRB 736 (1988), and reaffirmed *Mike Yurosek & Son*, 292 NLRB 1074 (1989). *Mike Yurosek* was a case in which the photographing was accompanied by statements that "could reasonably put employees in fear that the pictures would be used for future reprisals."

Randell Warehouse was decided by the Board after oral argument with a second case that was settled prior to decision. That second case dealt with the issue of employer videotaping. The Board's *Randell* decision includes the views of the minority and concurring Members on the majority holding that it would make a distinction between union and employer videotaping.

See also *Nu Skin International*, 307 NLRB 223 (1992), in which photographing employees attending the union's picnic luncheon was not found to be objectionable.

24-400 Interference with the Conduct of Elections

393-6081

393-7022

In chronological order, having dealt with preelection campaign activities in their several aspects, we come now to the issues which arise as a result of conduct at the actual time of the election. As in the case of preelection conduct, so in conduct at or near the polls, full regard is

accorded to the rights of eligible voters in the exercise of their franchise. As the Board put it in *New York Telephone Co*., 109 NLRB 788, 790–791 (1954):

> The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question. Where . . . the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining our standards there appears no alternative but to set this election aside and to direct a new election.

This principle has been stated and restated in a countless number of cases and, in keeping with it, the Board tests the many types of procedural objections to an election which come before it. Elections may be set aside on procedural grounds or because of the conduct, deliberate or inadvertent, of the parties themselves or, as we have seen in the preceding chapter, even of third parties, of election observers or of others at the polls, or of Board agents if they fail to live up to the Agency's high standards of impartiality and fairness. Accord: *Sawyer Lumber Co*., 326 NLRB 1331 (1998).

The Regional Director has broad discretion in making election arrangements, and in the absence of objective evidence that this discretion has been abused, the election is upheld. See, for example, *Milham Products Co*., 114 NLRB 1544, 1546 (1955); and *Independent Rice Mill*, 111 NLRB 536 (1955). The Regional Director's discretion in conducting an election includes, among others, the extension of voting time (*Glauber Water Works*, 112 NLRB 1462 (1955)); determining the date of the election (*Comfort Slipper Corp*., 112 NLRB 183 (1955)); and the use of IBM voting cards as an additional means of identification of voters (*New York Shipping Assn*., 109 NLRB 310 (1954)).

Where the Regional Director's investigation of timely filed objections uncovers a matter relating to the conduct of a Board agent or the functioning of Board processes sufficient to cause the election to be set aside, the Board will consider such matter even if not within the scope of those objections. *Richard A. Glass Co*., 120 NLRB 914 (1958).

Alert attention to the proprieties and regularity of a Board election, like charity, starts at home. We will therefore begin our analysis of conduct affecting the election by turning our attention to Board agent conduct.

24-410 Board Agent Conduct

370-9100

378-9067

The conduct of Board agents must be beyond reproach and "must not tend to destroy confidence in the election process." *Athbro Precision Engineering Corp*., 166 NLRB 966 (1967). For an extensive discussion of Board agent conduct by a divided Board, see *Sonoma Health Care Center*, 342 NLRB 933 (2004).

a. Ballot box security

Leaving an unsealed package of blank ballots unprotected during a period when access to the ballot box was possible is regarded as a serious irregularity on the part of the Board agent, even in the absence of evidence that any ballots had been removed or that improper voting had occurred, or that any person had attempted to put more than one ballot in the ballot box. *Hook Drugs*, 117 NLRB 846 (1957); and *Tidelands Marine Services*, 116 NLRB 1222 (1956).

"We do not believe," said the Board, "that we should speculate on whether something did or did not occur while the ballot box was left wholly unattended. The Board, through its entire history, has gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting process; and where a situation exists, which, from its very nature, casts a

doubt or cloud over the integrity of the ballot box itself, the practice has been, without hesitation, to set aside the election." *Austill Waxed Paper Co*., 169 NLRB 1109 (1968).

In *Austill* the ballot box became unattended when an altercation which developed during the voting period outside the polling place drew attending officials away. A later case, *Anchor Coupling Co*., 171 NLRB 1196 (1968), was distinguished from *Austill* to the significant extent that "the ballot box was not left wholly unattended" and both the employer's observers—the employer was the one who filed objections to the election—certified that the ballot box was protected in the interest of a fair and secret election. See also *General Electric Co*., 119 NLRB 944 (1957), where it had been established that at no time did anyone other than a Board agent touch any blank ballots which, along with the ballot box, were in the polling area in full view of all the observers. As there was no possibility of impropriety the election was upheld.

In *Ashland Chemical Co*., 295 NLRB 1039 (1989), the Board overruled objections based on the Board agent opening the ballot box before the arrival of the observer. The Board found no evidence of a violation of the integrity of the ballot box. *Queen Kapiolani Hotel*, 316 NLRB 655 (1995).

A Board agent's leaving the polling place to notify the employees that it was time to vote, if he carries the ballot box and blank ballots with him and does not let them out of his possession and is accompanied by observers, is no ground for invalidating the election. *S. S. Kresge Co*., 121 NLRB 374 (1958). Even removal of a ballot from the box to explain to observers how a valid ballot should be marked is not objectionable if secrecy has not been impaired and the ballot is returned to the ballot box. *O. K. Van & Storage Co*., 122 NLRB 795 (1958). But see *Jakel, Inc*., 293 NLRB 615 (1989), where a ballot was retrieved from the box in order to complete a challenge. The Board found the conduct affected the integrity of the election. Compare *K. Van Bourgondien & Sons*, 294 NLRB 268 (1989); and *Rheem Mfg. Co*., 309 NLRB 459 (1992) (ballots not determinative). See also *Madera Enterprises*, 309 NLRB 774 (1992).

There are no absolute guidelines, however, as clearly stated in *Polymers, Inc*., 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970):

> Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.

Thus, looking to the facts of each case, the Board will not set aside the election unless it finds a reasonable possibility of a breach in security. An objection relating to the integrity of the election process requires an assessment of whether the facts indicate that "a reasonable possibility of irregularity inhered" in the conduct of the election. *Peoples Drug Stores*, 202 NLRB 1145 (1973) (in which the Board examined the theoretical possibility as against the improbabilities of the factual circumstances); *Indeck Energy Services*, 316 NLRB 300 (1995); and *Dunham's Athleisure Corp*., 315 NLRB 689 (1994). A simple mistake in the tally of ballots, later corrected, is not a basis for a new election. *Allied Acoustics*, 300 NLRB 1183 (1990).

The Board also pointed out in *Polymers, Inc*., supra, that, in a given case, even literal compliance with all of the rules, regulations, and guidelines would not satisfy the Board that the integrity of the election was not compromised. Conversely, the failure to achieve absolute compliance with these rules does not necessarily require that a new election be ordered, "although, of course, deviation from standards formulated by experts for the guidance of those conducting elections will be given appropriate weight in our determination." In resolving issues based on allegations of security breach, the Board looks at all the facts and the inferences drawn from such facts. Thus, in *Polymers*, although the Board agent did not retain personal physical

custody of the sealed ballot box and the blank ballots at all times, the facts indicated an "extreme improbability" of any violation of the ballot box. See also *Benavent & Fournier, Inc*., 208 NLRB 638 (1974), in which the Board declined to set aside the election even though the Board agent left the polling area for 5 minutes, leaving unmarked ballots and the unsealed ballot box with the observers. There was no evidence that anyone touched the ballots in his absence. See also *Kirsch Drapery Hardware*, 299 NLRB 363 (1990); *Trico Products Corp*., 238 NLRB 380 (1978); and *Niagara Wires*, 237 NLRB 1347 (1978).

b. Other conduct

Although the fact of the Board agent's drinking beer with a union representative did not affect the votes of the employees, the Board nevertheless set the election aside to protect the integrity of its processes. *Athbro Precision Engineering Corp.*, supra; principle enfd. 423 F.2d 571 (1970). Compare *Newport News Shipbuilding Co*., 239 NLRB 82, 87 (1978), where a Board agent allegedly accepted an observer's request that he come to the agent's room with liquor. As no employees were present, the Board did not set the election aside. The Board also noted that there were a large number of Board agents at this election and this was the only such incident. See also *Rheem Mfg. Co*., supra, where the Board did not set the election aside when the Board agent walked through the plant with the union observer and *Indeck Energy Services*, supra.

The Board rejected as grounds for setting aside an election the fact that the Board agent at the election had appeared as one of two counsels for the General Counsel at an unfair labor practice proceeding held more than 2 weeks prior to the election, at a location substantially distant from employer's plant, and where only rank-and-file employees were in attendance. Footnote 1 of the decision did note, however, that wherever feasible, in order to keep the conduct of elections completely separate from the investigation or trial of contemporaneous unfair labor practice charges involving the same parties, the Regional Director should designate as election agent someone other than one of the trial attorneys involved in the unfair labor practice case. *Kimco Auto Products*, 184 NLRB 599 (1970).

It was argued in another case that an election be set aside because of the Board agent's conduct in investigating unfair labor practice charges against the employer between shifts of a split election. The Board declined to do so since only three employees were interviewed, all away from the employer's premises, and there was no evidence that other employees witnessed the interviews or became aware of them. *Amax Aluminum Extrusion Products*, 172 NLRB 1401 (1968). See also *McCarty-Holman Co*., 114 NLRB 1554 (1955). The Board made the comment in *Amax*, however, that it would be "better practice for the board agent conducting an election to refrain from investigating unfair labor practices charges between shifts of the election." In *Sparta Health Care Center*, 323 NLRB 526 (1997), the Board rejected the argument that there was any impropriety in the representation case hearing officer later serving as counsel for the General Counsel in an 8(a)(5) "test of certification" proceeding. See also *S. Lichtenberg & Co*., 296 NLRB 1302 (1989), where a newspaper article quoting a Board agent concerning a pending unfair labor practice complaint was not a basis for setting the election aside.

The Board has consistently held that a primary consideration in the conduct of any election is whether the employees are given adequate notice and sufficient opportunity to vote. *Cities Service Oil Co*., 87 NLRB 324 (1949); and *Wilson Athletic Goods Mfg. Co*., 76 NLRB 315 (1948). Thus, while an election proceeding was processed with dispatch (the field examiner set the election for November 13, and mailed notices of the election to the employer on November 5), the Board agent had not acted arbitrarily in not conducting a longer investigation before issuing the notice of hearing. The Board held that as nearly 95 percent of the eligible employees voted in the election and there was no showing that any employee was foreclosed from voting because of the alleged haste in holding the hearing and the election, the objection to the election was without merit. *Arnold Stone Co*., 102 NLRB 1012 (1953). Similarly, a Board agent's inquiry as to whether two employees had voted was not considered to reflect bias where the Board agent

did not know that there were two other employees similarly situated. *Pacific Grain Products*, 309 NLRB 690 (1992).

The Board found no basis for setting aside the election in *Foremost Dairies of the South*, 172 NLRB 1242 (1968), stating that the presence of challenged voters waiting to cast a ballot cannot be equated with the unjustified presence of uninterested persons, even if one of them was a former supervisor, and that the presence of a former supervisor who is no longer on the employer's payroll cannot be equated with the presence of a management representative. Compare *Harry Lunstead Designs*, 270 NLRB 1163 (1984), where the Board agent gave erroneous instructions as to the challenged ballot procedure and the Board set aside the election.

Where a Board agent permitted the union's observer, without objection from the employer's observer, to give the only Spanish-speaking employee direction on how to vote, in Spanish, but there was no evidence of electioneering, the election was upheld. *Regency Hyatt House*, 180 NLRB 489 (1969). But see *Alco Iron & Metal Co*., 269 NLRB 590 (1984).

Although it was impossible to determine whether an irregularity in the course of an election affected its outcome, the election was set aside where certain ballots were temporarily mislaid. This decision was based on the long-established principle that "the Board is responsible for assuring properly conducted elections, and its role in the conduct of elections must not be open to question" *New York Telephone Co*., supra at 790. In this case, the employer contended that the premature closing, in the presence of employees waiting to vote, gave rise to rumors that the Board agent favored the employer and created an atmosphere of confusion, bias, and prejudice against the employer which affected votes cast in the afternoon session. *Kerona Plastics Extrusion Co*., 196 NLRB 1120 (1972). See also *B & B Better Baked Foods*, 208 NLRB 493 (1974).

A Board agent's comment to other agents, "You've got yourself a winner," made after all ballots had been cast, was no basis for invalidating the election. The Board considered the choice of language "unfortunate," but interpreted it in context as indicating that, in the view of the Board agent, new colleagues were participating in an election presenting unusual complications, rather than as a prejudgment of challenged ballots yet to be resolved. *Wald Sound, Inc*., 203 NLRB 366 (1973). In a similar vein, the mere statement by a Board agent that the polls were open and the employees could, if they desired, "now vote for your union representative" was not a sufficient basis to set aside the election. *Wabash Transformer Corp*., 205 NLRB 148 (1973), enfd. 509 F.2d 647 (8th Cir. 1975). But in *Renco Electronics*, 330 NLRB 368 (1999), the Board found an unacceptable breach of neutrality when the Board interpreter asked an employee, "Do you know where to put your yes vote?"

In *Sonoma Health Care Center,* 342 NLRB 933 (2004), the Board agent, in response to a question from the union observer about the attitude of companies toward unions, said, "Companies don't like unions because they cannot fire or hire anyone and they cannot take benefits from the staff." A divided Board found the statement "intemperate and inappropriate" but not a bases for setting aside the election.

A Board agent who periodically asked voters waiting in line to stop talking was not remiss because some unspecified conversations nevertheless took place. As stated by the administrative law judge and upheld by the Board, "There never has been a rule requiring absolute silence among voters waiting to vote." *Dumas Bros. Mfg. Co*., 205 NLRB 919, 929 (1973). In *Pacific Grain Products*, 309 NLRB 690 (1992), the Board refused to set aside an election where management representatives walked into the polling area where it was not marked. Their entrance allegedly resulted in a verbal altercation between the Board agent and the managers.

Dismantling of the election booth before the agreed upon closing time was not found objectionable where no employee was disenfranchised. *Sawyer Lumber Co*., 326 NLRB 1331 (1998).

Premature disclosure of the Regional Director's unit determination over a month before the election was not a basis for setting aside an election. *Kleen Brite Laboratories*, 292 NLRB 747 (1989).

The fact that Board agents are in a collective-bargaining unit does not affect their neutrality. *Monmouth Medical Center*, 234 NLRB 328, 331 (1978). *Monmouth* also involved an allegation that literature referring employees to the Board was objectionable. The Board rejected that contention, but enforcement was denied 604 F.2d 820 (3d Cir. 1979). The Board has since cited *Monmouth* with approval. *Dave Transportation Services,* 323 NLRB 562 (1997).

See also *Fresenius USA Mfg., Inc.,* 352 NLRB No. 86 (2008), the Board set aside election based on the Board agent's failure to display ballots for inspection during count and mistakes in ballot identification during election.

See section 22-106, Concerning content of Notice of Election in cases where election is rescheduled for adminstrative reasons.

24-420 Mechanics of the Election

While in a real sense the mechanics of a Board election are inextricably tied in with Board agent conduct, it seems more logical to separate the two, to the extent possible, for the sake of clarity in the analysis of conduct-of-election issues.

24-421 The Polling Place

370-1425

370-1450

370-1475

Elections are generally on the employer's premises in the absence of good cause shown to the contrary. If an election is held away from the employer's premises, the initial suggestion of a place is normally made by the party proposing it, but final arrangements are made by the Board agent. The size of a polling place depends on the nature of the election, the number of voters, and the length of the voting period being pertinent factors.

The choice of a place for holding an election is within the Regional Director's discretion, and failure to consult with the parties in this regard is not per se prejudicial. *Korber Hats, Inc*., 122 NLRB 1000 (1959). Nor is the failure to post signs designating the polling area. *Sawyer Lumber Co*., 326 NLRB 1331 (1998). Holding an election at the employer's place of business or near a place of management responsibility does not require that the election be invalidated. *Jat Transportation Corp*., 131 NLRB 122 (1961); and *Cupples-Hesse Corp*., 119 NLRB 1988 (1958). "Mere location of the polling place behind a picket line is not of itself prejudicial to the fair conduct of an election. . . . [without a showing] that the Union was in fact prejudiced or that the secrecy of the election was impaired because of the location of the polling place." *Korber Hats*, supra at 1001. For those unable to come to the polling place, balloting may be held elsewhere, if attended by appropriate safeguards and the request is timely made, although such action is discretionary with the Board agent and quite unusual. *Growers Warehouse Co*., 114 NLRB 1568 (1955).

In *Robert F. Kennedy Medical Center*, 336 NLRB 765 (2001), a divided panel overruled an objection to the election because one of two entries to the polling area became locked after the polling began.

See also section 24-525.

24-422 Opening and Closing of the Polls

370-9167-4800

370-9167-8800

370-9167-9500

Where the opening of the polls is delayed and the number of employees possibly disenfranchised thereby is sufficient to affect the election, the election is set aside, whether or not those voters or any voters at all were actually disenfranchised. The test is an objective one. *Pea Ridge Iron Ore Co*., 335 NLRB 161 (2001). See also *Jim Kraut Chevrolet*, 240 NLRB 460 (1979), and *Bonita Ribbon Mills*, 87 NLRB 1115 (1949). Additional voting time provided on the day of the election does not in and of itself generally remedy the uncertainty caused by starting late. *G.H.R. Foundry Division*, 123 NLRB 1707 (1959). "Proper election procedure requires every reasonable precaution that a full opportunity to vote be given those eligible. That opportunity is best assured where the means of determining [opening and] closing time in the most accurate way available is included in the election arrangements made before the election occurs." *Repcal Brass Mfg. Co*., 109 NLRB 4 (1954). For two cases in which late opening of polls which reached different results, see *Jobbers Meat Packing Co*., 252 NLRB 41 (1980); and *Nyack Hospital*, 238 NLRB 257 (1978) (election set aside). See also *Midwest Canvas Corp*., 326 NLRB 58 (1998).

In *Arbors at New Castle,* 347 NLRB 544 (2006), the Board rejected objections to a late opening of the polls based on the parties stipulation that the five eligible employees who did not vote, had not appeared at the polls "at anytime during the scheduled polling hours."

In *Rosewood Care Center*, 315 NLRB 746 (1994), the Board refused to fault the Board agent for not making arrangements for late voters because the voters never showed up. An unscheduled mid-session closing of the polls warranted setting aside the election where the number of voters possibly disenfranchised could have affected the election results. *Wolverine Dispatch, Inc*., 321 NLRB 796 (1996).

An objection to an election was sustained where the Board agent refused to permit two eligible voters to cast their ballots after the polls had closed in view of the "special circumstances" of the case; i.e., a brief 15-minute voting period and the facts that the Board agent was aware that the two employees had tried to vote earlier and again sought to vote only minutes after the polls had closed, the ballot box had not been opened nor the tally of ballots yet started, and the addition of two valid ballots may have affected the election results. *Hanford Sentinel*, 163 NLRB 1004 (1967). Compare *Atlantic International Corp*., 228 NLRB 1308 (1977). See also *Consumers Energy Co.,* 337 NLRB 752 (2002); *Kerrville Bus Co*., 257 NLRB 176 (1981);, and *American Driver Service*, 300 NLRB 754 (1990) (late mail ballots).

An objection that the voting began after the announced time and that the polls were closed ahead of time was overruled when it appeared that the polls were only 2 or 3 minutes late in opening due to a delay in setting up the polling place, all eligible voters present cast ballots, and there were no prospective voters waiting in line to cast ballots when the polls were closed. Of the two eligible voters who did not vote, one was on leave of absence and the other absent because of illness. *Smith Co*., 192 NLRB 1098, 1102 (1971). See also *Dominguez Valley Hospital*, 251 NLRB 842 (1980). However, in *Monte Vista Disposal Co*., 307 NLRB 531 (1992), and *Pruner Health Services*, 307 NLRB 529 (1992), the Board announced a "bright-line rule terminating the balloting at the conclusion of the voting period" absent extraordinary circumstances or agreement of the parties. *Rosewood Care Center*, supra. In *Rosewood,* the Board approved an agreement permitting an early arrival to vote. Compare *Kerona Plastics Extrusion Co*., supra. See also *Argus-Press Co*., 311 NLRB 24 (1993); *Taylor Cadillac*, 310 NLRB 639 (1993); and *Visiting Nurses Assn*., 314 NLRB 404 (1994).

It is the Board agent's responsibility to challenge the ballot of a late arriving voter in the absence of agreement of the parties that the individual can vote. See *Laidlaw Transit, Inc*., 327 NLRB 315 (1998).

An election is not set aside because a voting booth is dismantled before closing time unless it is shown that this conduct deprived any eligible voter of the opportunity to vote. *O. K. Van & Storage Co*., 122 NLRB 795 (1958). Accord: *Sawyer Lumber Co*., supra.

For related discussion, see section 24-425, infra.

24-423 Notice of Election

370-2800

A standard notice of election (form NLRB-707) is used to inform eligible voters of the balloting details. The notice contains a sample ballot with the names of the parties inserted, a description of the bargaining unit, the date, place, and hours of election, and a statement of employee rights under the Act. Other relevant details are inserted where necessary. In *Penske Dedicated Logistics*, 320 NLRB 373 (1995), the Board affirmed the election results where the notices were timely posted in a place where notices were customarily maintained even though the area was locked on Saturday and Sunday pursuant to the employer's regular practice.

In 1987, the Board announced that henceforth the procedures for posting notices of election would be governed by a rule (Sec. 103.20 of the Rules). Under this rule the notice must be

(1) posted for 3 full working days in advance of the election.
(2) a party responsible for misposting is estopped from objecting to the nonposting.
(3) an employer is conclusively deemed to have received the notices unless it notifies the Regional Office at least 5 full working days before the election of its nonreceipt.

See *Club Demonstration Services*, 317 NLRB 349 (1995); and *Ruan Transport Corp*., 315 NLRB 592 (1994), holding that Saturdays, Sundays, and holidays are not working days within the meaning of the Rules. Compare *Cleveland Indians Baseball Co.*, 333 NLRB 579 (2001), where the Board refused to set aside a stipulated election where no employees were scheduled to work during most of the posting period.

(4) failure to post the notices as required is ground for a new election when objections are filed.

See also *Sugar Food*, 298 NLRB 628 (1990), for a discussion of the rule and the policy with respect to defaced notices.

The rule is strictly enforced. *Smith's Food & Drug*, 295 NLRB 983 (1989).

But in *Madison Industries*, 311 NLRB 865 (1993), the Board did not set aside an election where an amended notice was posted for a portion of the time. The Board found that the change in the notice (eligibility) did not affect the notice to employees of the election that is the purpose of the Rule. Neither was the election set aside in a two union election where the circumstances could "invite collusion" by any employer who might favor one of the competing unions. The employer's failure to post in such circumstances would provide an unsuccessful favored union with a basis to set aside the election. *Maple View Manor, Inc*., 319 NLRB 85 (1995).

Compare *Terrace Gardens Plaza*, 313 NLRB 571 (1993), where a divided panel of the Board strictly enforced the rule in a mail ballot situation even where, although the posting was not timely received by the employer, copies of the notice were sent to employees with the ballots.

See section 24-441 for discussion of policy as to defaced notices and section 22-106 concerning contest of notice in cases where election is rescheduled for administrative reasons.

24-424 Observers

370-4900

Each party is normally permitted to be represented at the polling place by an equal predesignated number of observers, usually employees of the employer who are not in the unit or in the voting group. *Best Products Co*., 269 NLRB 578 (1984). Compare *Frontier Hotel v. NLRB*, 625 F.2d 293 (9th Cir. 1980).

The use of observers at a directed election is a privilege, not a right, and the presence of observers other than Board agents is not required by the Act and may be waived. *Best Products*, supra. See *Breman Steel Co*., 115 NLRB 247, 249 (1956); and *Simplot Fertilizer Co*., 107 NLRB 1211 (1954). In a consent election, however, the use of observers, if incorporated in the agreement, is a matter of right since it is a material term of the "consent-election agreement," and, if this right is not waived, the election is subject to invalidation. *Breman Steel Co*., supra, and *Asplundh Tree Export Co*., 283 NLRB 1 (1987). See also, for example, *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388 (8th Cir. 1947), cert. denied 332 U.S. 758 (1947). In *Northern Telecom Systems*, 297 NLRB 256 (1989), the Board held that a waiver of an observer by one party cannot be an objection to the election by another party.

The standard procedure, as already indicated, is to allow the parties to use employees as observers, it being unusual to use outside observers. It is therefore no abuse of a Regional Director's discretion to decline the use of outside observers at some of several polling places. *Jat Transportation Corp*., , supra at 125–126. However, in *San Francisco Bakery Employers Assn*., 121 NLRB 1204 (1958), a nonemployee observer was used, the election was nonetheless upheld since the observer was not shown to have been guilty of any misconduct or that any prejudice resulted as a consequence. See also *Reflector Hardware Corp*., 121 NLRB 1544, 1547 (1958); and *Kelly & Huber*, 309 NLRB 578 (1992), where the use of a nonemployee who had been a supervisor was held to be a minor breach of the stipulation and not a basis for setting aside the election. No objection was filed based on the former supervisory status.

In *Embassy Suites Hotel*, 313 NLRB 302 (1993), the Board affirmed that a nonemployee can be used as an observer absent evidence of prejudice to the interests of the other party or misconduct by the observer. In doing so, the Board stated that this policy applies even when the nonemployee is an ex-employee whose discharge is not being litigated, distinguishing *Correctional Health Care Solutions*, 303 NLRB 835 (1991), where the Board held that ex-employees whose status is being litigated retain per se eligibility to act as observers.

Objections to particular persons acting as observers must be made at the preelection conference or they are waived. *Liquid Transporters, Inc*., 336 NLRB 420 (2001); *Monarch Building Supply,* 276 NLRB 116 (1985); and *St. Joseph Riverside Hospital*, 224 NLRB 721 (1976). Compare *Bosart Co*., 314 NLRB 245 (1994), where the union was unaware of the supervisory status of the observer until after the election.

And in *Browning-Ferris Industries of California*, 327 NLRB 704 (1999), the Board found objectionable a Board agent's decision to conduct an election without union observers where the union proposed to use former employees as observers. It also described the procedure that Board agents should follow when made aware of a party's intent to use an observer who may be objectionable. The agent is to advise all parties of the consequences of the choice and should do so openly. See also *Detroit East, Inc.,* 349 NLRB 935 (2007).

It is general Board policy, in the interest of free elections, that persons closely identified with management may not act as observers either for the employer, see, e.g., *Sunward Materials*, 304 NLRB 780 (1991); *Mid-Continent Spring Co*., 273 NLRB 884 (1985); *Peabody Engineering Co*., 95 NLRB 952, 953 (1951); and *Union Switch & Signal Co*., 76 NLRB 205 (1948), or the union. *Family Services Agency*, *San Francisco,* 331 NLRB 850 (2000).

The Board will not allow union officials to serve as observers in decertification proceedings. *Butera Finer Foods*, 334 NLRB 43 (2001). The Board had allowed union representatives to serve

prior to *Butera*. See, e.g., *E-Z Davies Chevrolet*, 161 NLRB 1380 (1966); *Carl Simpson Buick*, 161 NLRB 1389 (1966), enfd. 395 F.2d 191 (9th Cir. 1968); and *Standby One Associates*, 274 NLRB 952 (1985). The Board in *Butera* specifically declined to rule on whether it would allow union officials in nondecertification cases. See footnote 7. But see *Fleet Boston Pavilion,* 333 NLRB 655 (2001), where the Board overruled an objection to the use of a union president as an observer, noting that he had worked for the employer, had been injured on the job, and was obtaining medical treatment that would allow him to return. The Board further noted that the observer was not involved in the referral of employees from the union's hiring hall.

Holding an election without the observers of one party present does not invalidate an election if both parties are given an equal and adequate opportunity to have observers present. *Manhattan Adhesives Corp*., 123 NLRB 1096 (1959). See also *Inland Waters Pollution Control*, 306 NLRB 342 (1992), where the Board agent did not allow late arriving observer to assume duties. Nor is an election set aside if an employer denies an employee permission to leave work to serve as an observer, where the employee had inadvertently made no arrangements for release. *San Francisco Bakery Employers Assn*., 121 NLRB 1204 (1958). An employee whose discharge is the subject of an unfair labor practice proceeding is entitled to serve as an observer as he is considered an "employee" during the pendency of the charge. *Correctional Health Care Solutions*, 303 NLRB 835 (1991); and *Soerens Motor Co*., 106 NLRB 1388 (1953). This is equally true of persons whose eligibility to vote as employees in layoff status is still in question, even if they are later found ineligible. *Thomas Electronics*, 109 NLRB 1141 (1954). Being a union official does not disqualify a person from being an observer. *Bordo Products Co*., 119 NLRB 79, 80 (1957).

An employer is not required to treat its own observers the same as union observers with respect to pay and leave during the election. In *American Red Cross Missouri-Illinois Blood Services Region,* 347 NLRB 347 (2006), the Board permitted the employer to compensate its own observers for time spent observing the election while requiring the union observers to use accumulated paid time off. Nor did the Board find objectionable the employer's preelection meeting with its own observers to explain the observers' role in the election process even though the union observers were not invited to the meeting.

For cases dealing with the conduct of observers at an election, see *Sir Francis Drake Hotel*, 330 NLRB 638 (2000) (innocuous comments by observer, not objectionable); compare *Brinks Inc*., 331 NLRB 46 (2000); *Tom Brown Drilling Co*., 172 NLRB 1267 (1968); *Hallandale Rehabilitation Center*, 313 NLRB 835 (1994) (alleged to have kept a list and checked off the names of voters after they voted); and *Fibre Leather Mfg. Corp*., 167 NLRB 393 (1967) (role of observers in election involving foreign-language voters). In *Brinks, Inc*., supra, a divided Board found a union observer's "vote union" comment and thumbs up sign to be improper electioneering. Compare *U-Haul Co. of Nevada, Inc.,* 341 NLRB 195 (2004) (observer thumbs ups not linked to campaigning).

The conduct or circumstances surrounding the duties of an observer may be a basis for election objections. In *Easco Tools*, 248 NLRB 700 (1980), the payment to observers of a rate substantially in excess of their employment wage could have affected the results of the election and the election was set aside. See also *S & C Security*, 271 NLRB 1300 (1984). Compare *Young Men's Christian Assn*., 286 NLRB 1052 (1987). Note that *Young Men's* was overruled in *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995). For further discussion of *Sunrise* see section 24-430. See also *Pacific Grain Products*, 309 NLRB 690 (1992), where the conduct of the observer involved only one employee and would not have affected the results of the election.

The wearing of insignia or buttons by observers, while discouraged, is not prohibited. See CHM section 11310; and *Larkwood Farms*, 178 NLRB 226 (1969).

More recently, the Board affirmed the importance of the observer when it refused to overrule challenges to purported ballots of employees who later testified they had not voted. The Board discussed the role of observers and indicated that overruling the challenges would undermine the role of the observers. *Monfort, Inc*., 318 NLRB 209 (1995).

Observers may not keep lists of those voting, but may keep a list of those they intend to challenge. *Cerock Wire & Cable Group*, 273 NLRB 1041 (1984). See also *Avante at Boca Raton, Inc*., 323 NLRB 555 (1997). In *Mead Southern Wood Products*, 337 NLRB 497 (2002), the Board suggested that it is preferable that a duplicate *Excelsior* list not be used as a challenge list.

The duties of an observer include making challenges for cause. The Board agent will not normally make challenges on behalf of the parties even if no observer is present. CHM section 11338; and *Solvent Services*, 313 NLRB 645 (1994). *Balfre Gear & Mfg. Co*., 115 NLRB 19, 22 (1956). Compare *Laubentein & Portz, Inc*., 226 NLRB 804 (1976), where the Board agent was held responsible to challenge in order to implement an unfair labor practice settlement. See also *H & L Distributing Co*., 206 NLRB 169 fn. 1 (1973), suggesting that there may be other circumstances in which the Board agent could challenge at the request of a party. See also *Lakewood Engineering & Mfg. Co.,* 341 NLRB 699 (2004), for a summary of Board agent's challenge duties.

For further discussion of lists by observers, see section 24-445, and for discussion of challenges and postelection challenges, see sections 22-111 and -115, supra.

24-425 Opportunity to Vote and Number of Voters

370-3533-2000 et seq.

370-7787

370-9167-6100 et seq.

The Board regards it as its responsibility to establish the proper procedure for the conduct of its elections. This procedure requires that all eligible employees be given an opportunity to vote. *Yerges Van Liners*, 162 NLRB 1259, 1260 (1967); and *Alterman-Big Apple, Inc*., 116 NLRB 1078 (1956).

Thus, where, as in *Yerges*, an employee had no opportunity to vote through no fault of his but because at the time of the election he was away from the plant in the normal course of his duties for the employer, and his vote would have been determinative of the results—the unit had only two eligible voters—the election was set aside. Accord: *Acme Bus Corp*., 316 NLRB 274 (1995). Compare *Daniel Construction Co*., 145 NLRB 1397, 1412 (1964), which involved the opportunity for voting on the part of individuals whose status as "employees" was in doubt. We have already mentioned *Hanford Sentinel*, 163 NLRB 1004 (1967), where voters were unable to vote under unusual circumstances and the election was set aside.

In *Sahuaro Petroleum & Asphalt Co*., 306 NLRB 586, 586–587 (1992), the Board summarized its policy:

> Where the conduct of a party to the election causes an employee to miss the opportunity to vote, the Board will find that to be objectionable if the employee's vote is determinative and the employee was disenfranchised through no "fault" of his own. *Versail Mfg*., 212 NLRB 592, 593 (1974). When an employee is prevented from voting by reason of sickness or some other unplanned occurrence beyond the control of a party or the Board, the inability to vote is not a basis for setting aside the election. Id. The burden is on the objecting party, in this case, the Union, to come forward with evidence in support of its objection. *Campbell Products Dept*., 260 NLRB 1247 (1982).

See also *Glenn McClendon Trucking*, 255 NLRB 1304 (1981), and *Cal Gas Redding, Inc*., 241 NLRB 290 (1979), in which the election was set aside because the eligible voters were prevented from voting because of assignments performed in the normal course of their duties. Compare *Coast North America (Trucking) Ltd*., 325 NLRB 980 (1998), enf. 207 F.3d 994 (7th Cir. 2000) (employee on vacation was not prevented from voting by either party); and *Waste Management of Northwest Louisiana*, 326 NLRB 1389 (1998) (directive to report to work at 8 a.m. did not prevent employee from arriving earlier in order to vote).

In one rather interesting case the actions of a third party in inadvertently locking the doors of the polling area may have contributed to some employees not voting. Accordingly, the election was set aside. *Whatcom Security Agency*, 258 NLRB 985 (1981). Compare *Robert F. Kennedy Medical Center*, 336 NLRB 765 (2001), and *Coast North America,* supra.

In *Rett Electronics*, 169 NLRB 1111 (1968), an objection alleged that (1) in view of weather conditions employees who tardily presented themselves to vote should have been allowed to cast a ballot, and (2) permitting a union observer to vote under challenge after other employees not closely identified with the petitioner were denied ballots prevented a fair election. The Board held (1) there was no disfranchisement of a determinative group of eligibles, only one of whom at best appeared after the closing of the polls, and (2) even assuming, arguendo, that the observer was permitted to cast "a challenged nondeterminative ballot" after the timely closing of the polls, this occurred concededly at a time when it would not have affected the free atmosphere of the election.

Employer conduct which confuses employees, and their confusion manifests itself in their spontaneous protests as soon as they learn that the election is over and they were denied an opportunity to vote, is a basis for setting an election aside. *Wagner Electric Corp*., 125 NLRB 834, 836 (1959). The confusion was created by the doors having been locked, the employees were told no one could go to the back room, and they were under the impression they would be told as to their voting opportunity.

In the case of a stipulation for a consent election, which provides for a manual election at a designated location, if no timely request is made for other arrangements, the late request may properly be rejected and a contention based on failure to provide an opportunity to vote may be found to be without merit. *Franklin's Stores Corp*., 117 NLRB 793, 795–796 (1957); and *Red Owl Stores*, 114 NLRB 176 (1955). See also *Community Care Systems*, 284 NLRB 1147 (1987), where the Board rejected an objection based on the failure to hold an election on a training date because the parties had stipulated to the date and no party objected before the election.

The requirement that employees be given an adequate opportunity to vote may not be waived by the parties to an election. *Alterman-Big Apple, Inc*., 116 NLRB 1078 (1956); and *Active Sportswear Co*., 104 NLRB 1057 (1953).

In *Lemco Construction*, 283 NLRB 459 (1987), the Board announced that it was abandoning any analysis which was "dependent on a numerical test to determine the validity of a representation election." Thus, the Board overruled prior precedent which considered whether the number of voters actually voting in the election was a representative group. See also *Community Care Systems*, supra. Then, in *Glass Depot*, 318 NLRB 766 (1995), a Board plurality distinguished *Lemco*, supra, indicating that a different result might obtain if that lack of a representative complement was caused by an extraordinary event, e.g., severe weather.

Later, however, in *Baker Victory Services*, 331 NLRB 1068 (2000), the Board announced:

> We conclude that the proper standard to be applied to the issue here is contained in *V.I.P. Limousine* [*V.I.P. Limousine,* 274 NLRB 641 (1985)], i.e., an election should be set aside where severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote. Accordingly, we reaffirm that standard today, and we reject the "representative complement" standard set forth in the plurality opinion in *Glass Depot*.

Although the number of voters voting in a Board election will not ordinarily affect the validity of a Board election, a union obtaining recognition by private means must be supported by a majority of the unit employees whether that support is shown by authorization cards or by a private election. *Autodie International, Inc.,* 321 NLRB 688, 691 (1996) (recognititon unlawful where votes cast for labor organization were not a majority of the unit); and *Komatz Construction, Inc., v. NLRB*, 458 F.2d 317, 322–323 (8th Cir. 1972) (unlawful recognition where union won majority of votes cast but not majority of total unit).

For discussion of late voters, see section 24-422, supra. See also 24-421 (The Polling Place).

24-426 Secrecy of the Ballot

370-7000

370-7750

Complete secrecy of the ballot is required by the Act and is observed in all Board-conducted elections. Conduct which tends to destroy or adversely affect such secrecy constitutes a ground for election invalidation. There must, of course, be reasonable doubt that the secrecy was affected. Bare assertions will not suffice. *Avante at Boca Raton, Inc*., 323 NLRB 555 (1997).

The Board's duty to preserve the secrecy of the ballot is statutory and a matter of public concern, rather than a personal privilege subject to waiver by the individual voter. To give effect to such waivers would, as a practical matter, remove any protection of employees from pressures, originating with either employers or unions, to prove the way in which their ballots had been cast, and thereby detract from the laboratory conditions which the Board strives to maintain in representation elections. *J. Brenner & Sons, Inc*., 154 NLRB 656, 659 fn. 4 (1965). See also *Space Mark, Inc*., 325 NLRB 1140 (1998) (mail ballot completed by voter's wife was properly voided).

The Board has characterized its role in the conduct of elections as one which "must not be open to question." *New York Telephone Co*., 109 NLRB 788, 790 (1954). Thus, where, for example, improvised voting arrangements were in its opinion "entirely too open and too subject to observation to secure secrecy of the ballot," it set aside the election. *Imperial Reed Furniture Co*., 118 NLRB 911, 913 (1957). See also *Columbine Cable Co.,* 351 NLRB No. 65 (2007). Where, however, the voting booths were located at one end of a warehouse, and after voting some of the eligibles went to another part of the warehouse where they remained until the polls closed, the election was upheld. The Board noted the absence of electioneering or interference with voting. *Choctaw Provision Co*., 122 NLRB 474, 475 (1958); see also, for example, *G. F. Lasater*, 118 NLRB 802, 804 (1957). See also *Sewell Plastics*, 241 NLRB 887 (1979), where the Board analyzed allegations that observers could see voters voting in terms of the effect on the election, not secrecy of the ballot.

Circumstances may be such that a voter's identity may unavoidably become known. Thus, where a single professional employee constitutes one voting group while all the other employees constitute a second voting group, in a "*Sonotone*"(*Sonotone Corp.,* 90 NLRB 1236 (1950)) (or professional employees election), and the ballot in one group is different from those of the other, the ballot of the single professional employee is, of course, distinguishable but unavoidable. *Triple J Variety Drug Co*., 168 NLRB 988, 989–990 (1967) (Hearing Officer's Report on Objections and Challenged Ballots). For similar reasons, where a ballot was challenged as invalid in that, because of a tie vote, it lacked secrecy, the Board held that the fact that "a voter's identity may be publicly known as an unavoidable result of the challenge procedure, does not invalidate his vote in the determination of the election results." *Marie Antoinette Hotel*, 125 NLRB 207, 208 (1959). See also *De Vilbiss Co*., 115 NLRB 1164, 1169 (1956). Compare *J. C. Brock Corp*., 318 NLRB 403 (1995), where the Board found that a limited use of foreign language ballots was insufficient to destroy the secrecy of the ballot.

While secrecy of the ballot is of primary concern, the Board is also responsible for expediting questions concerning representation. In balancing these two goals, the Board has, in narrow circumstances, permitted challenged ballots to be opened and counted prior to a determination of voter eligibility. *Ladies Garment Workers*, 137 NLRB 1681 (1962). These circumstances are (1) the challenged ballots were cast by individuals who are alleged discriminatees in a pending unfair labor practice case; (2) the individuals have clearly waived their right to secrecy and requested that their ballots be opened; and (3) the circumstances are such that if some or all of the

challenged ballots have been cast for the union, the union will receive a majority regardless of how the challenges are ultimately determined. See, e.g., *Garrity Oil Co*., 272 NLRB 158 (1984), and *Premium Fine Coal*, 262 NLRB 428 (1982). Compare *El Fenix Corp*., 234 NLRB 1212 (1978), in which the Board appears to suggest that all the determinative challenges must be the subject of the unfair labor practice case. See also *United Insurance Co. of America*, 325 NLRB 341 (1998), and *JCL Zigor Corp*., 274 NLRB 1477 (1985), and section 22-115 of this text.

A voter is not permitted to withdraw his ballot, once cast. *Great Eastern Color Lithographic Corp*., 131 NLRB 1139 (1961). Nor can the parties be allowed to do so. Thus, the Board rejected a stipulation by the parties that a challenged but comingled ballot be considered as cast for the petitioner. "Acceptance of such an agreement," said the Board, "is not consistent with the Board's purpose of preserving the secrecy of the ballot and providing sufficient safeguards to prevent possible abuses of the election processes." *T & G Mfg*., 173 NLRB 1503, 1504 (1969). In that case, the ballot itself was not identifiable and the choice had been recorded in the tally of votes. There was no way of ascertaining how the vote was cast. The Board added: "We will not permit solicitation of such information from the voter, nor allow the parties to stipulate how a voter exercised his franchise, for this would create the very opportunity for collusion, coercion, and election abuse the Board is committed to prevent."

In *City Stationery, Inc.*, 340 NLRB 523 (2003), the Board rejected a contention that a settlement of unfair labor practice charges waived employees' rights to have their ballots counted.

For a discussion of cases in which a ballot is returned from the ballot box, see section 24-410 of this chapter.

Where several voters enter an election booth at the same time, an election is susceptible to invalidation. *Case Egg & Poultry Co*., 293 NLRB 941 (1989). However, the Board agent may remedy the situation by destroying the ballots marked under such circumstances and allowing each employee to vote again, thus, safeguarding the secrecy of the ballot. *Deeco, Inc*., 116 NLRB 990, 991 (1956). Moreover, "where . . . the impugned votes do not appear to be more than isolated instances and are not sufficient to affect the results of the election, the Board will not set the election aside." *Machinery Overhaul Co*., 115 NLRB 1787, 1788 (1956). Accord: *St. Vincent Hospital,* 344 NLRB 586 (2005).

Ballots which have been signed or marked so that the identity of the voter would or could be revealed are invalid. Such a situation occurred, for example, in *Ebco Mfg. Co*., 88 NLRB 983 (1950). In that case, the Board agent during the counting of ballots discovered a capital "R" with a circle drawn around it outside the voting boxes on the ballot. The Board held that distinguishing or identifying markings on ballots render such ballots void because to count such ballots "clearly would open the door to the exertion of influences such as to prevent the exercise of the voter's free choice," and would be inconsistent with the principle of a secret election. It is not necessary to establish the identity of the voter who cast the disputed ballot; it is sufficient that, upon an examination of the ballot, the markings in question appear to have been made deliberately, rather than accidentally or inadvertently, and that it may serve to reveal the identity of the voter. See also *Eagle Iron Works*, 117 NLRB 1053 (1957); and *Standard-Coosa-Thatcher Co*., 115 NLRB 1790 (1956), which hold that it is the policy of the Board to invalidate a ballot if it contains marks identifying the voter. This rule is equally applicable to invalidate ballots which might give "rise to the possibility of revealing the identity of the voter" (*Standard-Coosa-Thatcher Co.*, supra at 1792). "In the absence of evidence indicating that the ballot was deliberately marked for the purpose of identification, we will not disenfranchise a voter." *F. Strauss & Son, Inc*., 195 NLRB 583 fn. 2 (1972). See *Sorenson Lighted Controls*, 286 NLRB 969 (1987), invalidating a ballot that was shown by the voter to another voter. In *General Photo Products*, 242 NLRB 1371 (1979), the voter who revealed his ballot could not vote again.

The question of the validity of a ballot, as distinguished from a challenge to the eligibility of the person casting the ballot, may properly be raised by a timely objection after the count and is

not considered a postelection challenge. *F. J. Stokes Corp*., 117 NLRB 951, 954 (1957); and *Sorenson Lighted Controls, Inc*., supra.

24-427 Mail Ballots

370-6325 et seq.

370-6350 et seq.

370-6375 et seq.

Voting in appropriate instances may be conducted by mail, in whole or in part. Mail balloting is used, if at all, generally in unusual circumstances, particularly where eligible voters are scattered because of their duties or where long distances are involved. The Regional Director has discretion to authorize balloting by mail when appropriate. *Pacific Gas & Electric Co*., 89 NLRB 938 (1950); and *Southwestern Michigan Broadcasting Co*., 94 NLRB 30 (1951). See *Shepard Convention Services*, 314 NLRB 689 (1994), finding an abuse of discretion in the failure to direct a mail ballot election. In mixed manual mail elections, mail ballots are only sent to those eligibles who cannot vote in person. They are not sent to employees who, although eligible to vote, are ill, on vacation, or members of the armed services. Nor are they sent to the in-temporary layoff status unless all parties agree, but a notice of election may nonetheless be sent to these employees. Enforcement was denied in *Shepard* by the D.C. Circuit, *Shepard Convention Services v. NLRB,* 85 F.3d 671 (D.C. Cir. 1996).

In a series of cases in 1997, the Board ruled on the appropriateness of a mail-ballot election in a series of circumstances. See *Willamette Reynolds Wheels International*, 323 NLRB 1062 (1997).

Thereafter, in *San Diego Gas & Electric,* 325 NLRB 1143 (1998), the Board announced the factors it expected its Regional Directors to consider in deciding whether or not to direct a mail-ballot election:

1. Where eligible voters are "scattered" because of their job duties, over a wide geographic area;
2. Where eligible voters are "scattered" in the sense that their work schedules vary significantly so that they are not present at a common location and common times; and
3. Where there is a strike, a lockout or picketing in progress.

Since then the Board has reaffirmed the abuse of discretion standard under which it reviews decisions of Regional Directors to conduct mail, manual, or mixed elections. See *GPS Terminal Services, Inc*., 326 NLRB 839 (1998); *North American Plastics Corp*., 326 NLRB 835 (1998); *Masiongale Electrical-Mechanical*, 326 NLRB 493 (1998); *Nouveau Elevator Industries,* 326 NLRB 470 (1998); and *Diamond Walnut Growers, Inc.,* 326 NLRB 28 (1998).

The Board does not regard mail balloting as a "general course and method by which its functions are channeled and determined" within the meaning of Section 3(a)(2) of the Administrative Procedure Act. Consequently, a contention that an election was invalid because of the Board's alleged noncompliance with that provision was rejected. *F. W. Woolworth Co*., 96 NLRB 380, 381–382 (1951).

Illustrative of circumstances susceptible to mail balloting is where, because of the nature of their widespread over-the-road driving duties, eligible voters had places of employment and residences which were scattered throughout the United States. *National Van Lines*, 120 NLRB 1343 (1958). Mail balloting is also used at times in the maritime industry. *J. Ray McDermott v. NLRB*, 571 F.2d 852 (5th Cir. 1978). In *Pacific Maritime Assn*., 112 NLRB 1280 (1955), for example, the Regional Director described in full detail the many precautions taken to insure that a proper and secret ballot was taken, providing for the presence of delegates from each of the participating unions when the ballots were distributed. In two possible instances when the secrecy of the ballots might conceivably have been affected, the Board found that the number of ballots

involved would not have been sufficient to affect the results of the election. Also, in another case involving the maritime industry, the Board held that the fact a manual election had been conducted previously does not preclude the Regional Director, in his broad discretion, from conducting an election by mail. *Shipowners' Assn. of the Pacific Coast*, 110 NLRB 479 (1954); see also *Continental Bus System*, 104 NLRB 599, 601 (1953).

See *Brink's Armored Car*, 278 NLRB 141 (1986), and *Mission Industries*, 283 NLRB 1027 (1987), in which the Board describes the precaution necessary in these cases. See also *Club Demonstration Services*, 317 NLRB 349 (1995), for discussion of the rule on election notice posting in a mail ballot election; *Daves Newcomer Elevator Co*., 315 NLRB 715 (1994), for discussion of the Regional Officer's obligation to send duplicate election kits to employees who do not sign identification stub when returning mail ballots; and *Watkins Construction Co*., 332 NLRB 828 (2000), for a discussion of the policy on late arrival of mail ballots. In *Sadler Bros. Trucking & Leasing Co*., 225 NLRB 194 (1976), the Board ordered the Regional Director to accept a stipulation to waive the due date for two ballots. In *J. C. Brock Corp*., 318 NLRB 403 (1995), the Board rejected a contention that the use of foreign language ballots for some employees, destroyed the secrecy of the ballot. See *Northwest Packing Co*., 65 NLRB 890 (1946), for an interesting case involving allegations that the procedures affected the secrecy of the ballot. In that case the Board found that the ballots could not be opened with the proper protection for secrecy.

In *Aesthetic Designs, LLC*, 339 NLRB 395 (2003), a divided Board counted as valid a sample ballot that had been in the mail-ballot election kit.

In *Human Development Assn*., 314 NLRB 821 (1994), the Board ordered the employer to pay the costs of a second election where the employer was found to have interfered with the voting process in a mail-ballot election.

In *Fessler & Bowman, Inc.,* 341 NLRB 932 (2004), the Board unanimously agreed that it is objectionable for a party to collect mail ballots for submission to the Board, but divided evenly over whether solicitation for collection is objectionable and over whether to set aside the election only if the collected ballots would be determinative.

See also section 22-110. For a discussion of mail ballot elections and *Peerless Plywood,* see section 24-325(b).

24-428 Foreign Language Voters

370-2817-6700

370-4270

370-7067-2067-3300

Due regard must be given in Board elections to the needs of foreign language voters who are unable to read English. Where there is a showing of need for a foreign language translation on the notice of election, the Board will require such translation. See *Rattan Art Gallery*, 260 NLRB 255 (1982).

In *Kraft, Inc*., 273 NLRB 1484 (1985), the Board found that a ballot that attempted to indicate four languages was set up in such a way as to avoid confusion. Specifically, the Spanish and English translations which were typed seemed "lost or overshadowed" by the Vietnamese and Laotian translations. In the Board's view this created "high potential for voter confusion" and the notices of election do not cure defective ballots. Compare *Bridgeport Fittings*, 288 NLRB 124 (1988), where a ballot in three languages was laid out in such a way as avoid confusion. Moreover, the Board noted that there were only three or four voters affected by a poor Laotian translation and the election was decided by a margin of 72 votes. The Board approved the use of English on the ballot listing the name of the union.

A party who is aware of a foreign language problem among the voters is required to put the Board on notice as to the problem. See *Unibilt Industries*, 278 NLRB 825 (1986), and the cases cited therein.

It is the responsibility of the Board agent to assure that the election is conducted fairly and impartially. In *Alco Iron & Metal Co*., 269 NLRB 590 (1984), the Board set aside an election because the Board agent virtually turned over to the union observer the running of the election as it related to Spanish-speaking voters. Compare *Regency Hyatt House*, 180 NLRB 489 (1969), which is discussed at footnote 2 of *Alco*, supra, and *San Francisco Sausage Co*., 291 NLRB 384 (1988).

Board policy permits the use of foreign language notices of election and English ballots. See CHM section 11315. This policy was approved by the Seventh Circuit in *NLRB v. Precise Castings*, 915 F.2d 1160 (7th Cir. 1990). The court did so, however, noting that there was no "evidence of actual confusion." See *Flo-Tronic Metal Mfg*., 251 NLRB 1546 (1980), where the failure to include essential election information in the notice of election in Spanish was the basis for setting the election aside. In *Avante at Boca Raton, Inc*., 323 NLRB 555 (1997), the Board rejected a contention that the election should be set aside because the word "affiliated" was not translated for foreign language voters. The Board concluded that this did not affect voting decisions of the employees. See *Superior Truss & Panel, Inc*., 334 NLRB 916 (2001) (RD's refusal to provide ballots in Spanish not objectionable; Spanish translation of notice understandable).

24-429 Ballot Count

370-7700

370-7725

The Board agent conducting the election also conducts the ballot count. The determination of the Board agent can be challenged and in that case, the ballot is segregated in a challenge envelope and counted as a challenged ballot (CHM sec. 11340.7(a)).

In *Aesthetic Designs, LLC,* 339 NLRB 395 (2003), a divided Board counted as valid a sample ballot that had been provided in the mail ballot election kit.

In making the determination as to the ballot markings, the Board agent is to give effect to the unambiguous voter intent even though it may be an irregular marking or may be on the back of the ballot. *Hydro Conduit Corp*., 260 NLRB 1352 (1982). Accord: *Wackenhut Corp. v. NLRB*, 666 F.2d 464, 467 (11th Cir. 1982), and cases cited therein. Thus, for example, in *Horton Automatics*, 286 NLRB 1413 (1987), the Board found the proper voter intent to vote against the union when the voter wrote "non" across a ballot which was in both English and Spanish. See also *Kaufman's Bakery*, 264 NLRB 225 (1982), where the Board disregarded irregular markings made over the original "X"; and *Columbia Textile Services*, 293 NLRB 1034 fn. 4 (1989), where the voter had punched a hole through the "yes" box. See also *Brooks Bros., Inc*., 316 NLRB 176 (1995). In *Bishop Mugavero Center*, 322 NLRB 209 (1996), a divided Board found that a ballot marked with a single diagonal line in the "yes" box and "X" in the "no" box was a void ballot. Accord: *TCI West, Inc*., 322 NLRB 928 (1997). Compare *Osram Sylvania, Inc*., 325 NLRB 758 (1998), and *Thiele Industries*, 325 NLRB 1122 (1998).

In *Daimler-Chrysler Corp.,* 338 NLRB 982 (2003), the full Board divided over a ballot marked by an X in the "yes" box that also contained a handwritten question mark (?) immediately adjacent to the "yes" square. There were no markings on the "no" box. The majority found that the markings evinced the voters' intent to vote "yes" and that the question mark did not negate this expressed preference.

24-430 Payments to Off-Duty Employees to Encourage Voting

In *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), a divided Board held that monetary payments offered to employees as a reward for coming to a Board election that exceed

actual transportation expenses is objectionable. Accord: *Lutheran Welfare Services*, 321 NLRB 915 (1996); *Perdue Farms, Inc.*, 320 NLRB 805 (1996); and *Rite Aid Corp.*, 326 NLRB 924 (1998). Compare *Good Shepard Home*, 321 NLRB 426 1996), finding that the payments amounted to actual expenses. *Allen's Electric Co.,* 340 NLRB 1012 (2003). See also section 24-443 for discussion of the Board's policy of barring raffles that are in any way tied to voting in the election. *Atlantic Limousine*, 331 NLRB 1025 (2000).

The Board does not find payments for transportation or pay objectionable where the employees did not know of payments before voting. *Indiana Hospital, Inc*., 326 NLRB 1399 (1998), and *J.R.T.S. Limited, Inc*., 325 NLRB 970 (1998).

24-440 Electioneering

370-9167-5400

378-8400

The Board considers itself responsible for assuring properly conducted elections, and where irregularities concern essential conditions of the election and expose to question a number of ballots sufficient to affect the outcome of the election, there is no alternative in light of the high election standards maintained by the Board but to set aside the election. The effectuation of this principle is a serious factor in many and varied types of procedural objections to elections with which the Board is confronted.

The specific types of issues relating to this principle may either precede the date of the election or occur at or near the polls and involve conduct affecting the results of the election. Although the Board has traditionally declared its intention not to censor or police preelection campaign propaganda by parties to elections, it must, in order to preserve an atmosphere of impartiality, impose, certain limitations or methods on campaigning. *United Aircraft Corp*., 103 NLRB 102 (1953). See *Pearson Education, Inc.*, 336 NLRB 979 (2001). See *Chrill Care, Inc*., 340 NLRB 1016 (2003) (picketing at site of election, not objectionable).

For a discussion of the Board's policy with respect to electioneering and the factors to be considered in determining whether specific conduct is objectionable.

24-441 Ballot Reproduction

370-2850

378-2885-4093

378-2885-6050

378-4270-3300

4270-6775

The reproduction of a document which purports to be a copy of the Board's official secret ballot, but which in fact is altered for campaign purposes, tends to suggest to the voters, directly or indirectly, that this Agency endorses a particular choice. *Allied Electric Products*, 109 NLRB 1270 (1954).

After *Allied Electric*, the Board tended to follow a per se rule that an altered ballot or other Board material which tended to undermine the Board's neutrality would cause the election to be set aside. In *SDC Investment*, 274 NLRB 556 (1985), the Board reexamined this policy in light of its decisions in *Midland National Life Insurance Co*., 263 NLRB 127 (1982), and *Riveredge Hospital*, 264 NLRB 1094 (1982), and found that the "crucial question" in resolving issues of sample ballot alteration is whether the document "is likely to have given voters the misleading impression that the Board favored one of the parties to the election." 274 NLRB at 557. In two cases decided recently, the Board decided that the document involved clearly indicated that it was not a government document. See *Ursery Cos*., 311 NLRB 399 (1993), involving a letter from a

state representative, and *Taylor Cadillac*, 310 NLRB 639 (1993), involving a defaced sample ballot.

Thus, if the ballot or other material indicates that the source of the material is one of the parties, then the election will not be set aside. See *Comcast Cablevision of New Haven,* 325 NLRB 833 (1998); *C. J. Krehbiel Co*., 279 NLRB 855 (1986); *Worths Stores Corp*., 281 NLRB 1191 (1986); and *Baptist Home for Senior Citizens*, 290 NLRB 1059 (1988). The Board will examine extrinsic evidence to determine whether the document is misleading. See *Baptist Home*, supra at fn. 4, which implicitly overruled cases to the contrary, *3-Day Blinds, Inc*., 299 NLRB 110 (1990).

In *Archer Services*, 298 NLRB 312 (1990), and *3-Day Blinds*, supra, the Board found that the document was misleading and that there was no extrinsic evidence which indicated it was fromn a partisan source. Accordingly, the elections were set aside.

The Board has pointed out that the policy here is easily complied with by simply identifying on the document what its source is. *3-Day Blinds, Inc*., supra; *Professional Care Centers*, 279 NLRB 814 (1986); and *Rosewood Mfg. Co*., 278 NLRB 722 (1986).

Note: In *Brookville Healthcare Center*, 312 NLRB 594 (1993), the Board announced that because it has included language in its Notices of Election stating that there is no Board involvement in any defacement of notice, the *SDC Investment*, 274 NLRB 556 (1985), analysis is no longer required. Accord: *Wells Aluminum Corp*., 319 NLRB 798 (1995), and *Dakota Premium Foods*, 335 NLRB 228 (2001). *Brookville Healthcare* involved defacement of the official notice of election. Where the defacement was of a separate sample ballot, so that the *Brookville Healthcare Center* disclaimer was not readily available to the employees receiving the defaced ballot, the Board set the election aside. *Sofitel San Francisco Bay*, 343 NLRB 769 (2004).

The Board continues to experience objections based on altered ballots even after *Brookville Healthcare,* supra. See, e.g., *Oak Hill Funeral Home,* 345 NLRB 532 (2005). As a result, it announced a new policy in *Ryder Memorial Hospital,* 351 NLRB No. 26 (2007), whereby the disclaimer language will also be included on the ballot itself. Thus, NLRB ballots now state:

> The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

See also section 24-423, supra, for a discussion of the requirements for posting of the Notice of Election.

24-442 The *Milchem* Rule

370-4975

370-9167-5450

378-4242

378-8420

Adverting to the fact that, in prior decisions dealing with the effects of conversations between parties to the election and employees preparing to vote, no clear standard had been enunciated against which to measure such conduct, the Board established a rule prohibiting such conduct, "without inquiry into the nature of the conversations." *Milchem, Inc*., 170 NLRB 362 (1968). In *Rheem Mfg. Co*., 309 NLRB 459 (1992), the Board reaffirmed the applicability of *Milchem* to parties only and not to third-party conduct. See also *Lamar Advertising of Janesville*, 340 NLRB 979 (2003); *Yukon Mfg. Co*., 310 NLRB 324 (1993); and *Crestwood Convalescent Hospital*, 316 NLRB 1057 (1995).

The *Milchem* rule applies only to conduct by a party to the election, not to employee conduct. *Tyson Fresh Meats, Inc.,* 343 NLRB 1335 (2004).

The facts in *Milchem* were simple. During the voting period, a union official stood for several minutes near the line of employees waiting to vote, engaging them in conversation. While the union official said that his remarks concerned the weather and like topics, the Board found that "the sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election."

Applying the *Milchem* rule, an election was set aside where an individual, acting on behalf of the union, engaged in electioneering activities in close proximity to the polls during a substantial part of the voting period, notwithstanding the Board agent's instructions, on three separate occasions, that he leave the area and the admonition that he could not electioneer within 50 feet of the polls. The Board viewed this conduct as "a serious breach" of its rule against electioneering at or near the polls. *Star Expansion Industries Corp*., 170 NLRB 364 (1968). Distinguishable were *Sewanee Coal Operators' Assn*., 146 NLRB 1145 (1964), where, among other things, there was no specification by the Board agent of a "no electioneering" area; and *Intertype Co*., 164 NLRB 770 (1967), where the electioneering consisted of but one isolated remark to an employee at the end of the voting line.

Social pleasantries or chance remarks are not considered objectionable under the *Milchem* rule absent more. See *Sawyer Lumber Co*., 326 NLRB 1331 (1998), and *Dubovsky & Sons*, 324 NLRB 1071 (1997).

The *Milchem* rule was applied to a situation in which a supervisor went from person to person in the voting line, which varied from 15 to 50 employees, and engaged in conversational and handshaking activity. *Volt Technical Corp*., 176 NLRB 832 (1970).

In another case, where a single vote was determinative of the election and the conversations of petitioner's observer, already criticized by the Board agent, "culminated in his gratuitious offer of a loan to a prospective voter"; the election was set aside. *Modern Hard Chrome Service Co*., 187 NLRB 82 (1970).

Milchem is applicable to conversations between observers and voters and must be "prolonged." *Longs Drug Stores of California,* 347 NLRB 500 (2008), and *Lowe's HIW, Inc.,* 349 NLRB 478 (2007). Where the conversation is initiated by the voter or amounts to no more than mere social pleasantries, the Board has declined to set aside elections under *Milchem*, and *Modern Hard Chrome*, supra. In *Midway Hospital Medical Center*, 330 NLRB 1420 (2000), a divided panel distinguished between remarks directed at fellow voters, which are covered by the *Milchem* rule, and those directed at Board agents, union, and management officials, which were not considered covered by *Milchem.*

Thus, in *Angelica Healthcare Services*, 280 NLRB 864 (1986), enfd. sub nom. *Clothing & Textile Workers v. NLRB*, 815 F.2d 225 (2d Cir. 1987), a voter initiated a conversation with the union's observer by asking him how he was and by initiating further conversation on the subject of her recent surgery, when the observer responded, "Fine, how are you?" In *Oesterlen Services for Youth*, 243 NLRB 563 (1979), enfd. 649 F.2d 399 (6th Cir. 1981), cert. denied 454 U.S. 1031 (1981), the observer exchanged brief "pleasantries" with voters, answered one voter's question about turnout at the polls with the remark that more might vote at the shift change, told another that the observer would be at union meeting later that month, and spoke about work schedules with a voter who initiated the conversation by coming behind the observers' table to talk. In *Vista Hill Hospital*, 239 NLRB 667 (1978), enfd. 639 F.2d 479 (9th Cir. 1980), the case that comes closest to the line separating objectional conduct under *Milchem, Inc*., 170 NLRB 362 (1968), there were six very brief conversations, four consisting of innocuous greetings and comments on the weather, one involving a brief reply to an employee's question, and one (found by the court to be close to the kind of conduct condemned by *Milchem*) consisting of the observer's comment that if the employee voted for the union, he (the observer) would not be in so much trouble with the hospital. In *Brinks Inc.,* 331 NLRB 46 (2000), a divided Board found a union observer's "vote

union" comment and thumbs up sign to be improper electioneering. Compare *U-Haul Co. of Nevada, Inc.,* 341 NLRB 195 (2004) (observers "thumbs up" not linked to companying).

In *Hollingsworth Management Service,* 342 NLRB 556 (2004), the Board found improper electioneering where employees were manhandled in front of the others by individuals who came to the polling area "for the apparent purpose of systematically targeting voters with last minute campaigning."

Where during the balloting, two union representatives alternated in positioning themselves for conversation with voters at the foot of an outside stairway, 10 feet in length, leading to the second floor of a two-story building, and the polling area was in a conference room 20 to 25 feet down a hallway from the second floor entrance, the area outside this entrance was deemed beyond the "no electioneering" area established by the Board agent. The alleged conversations, the Board reasoned, did not take place with voters while the latter were in the polling area or in line waiting to vote, and therefore did not violate the *Milchem* rule. The establishment of a nonelectioneering area is left to the informed judgment of the Regional Director's agents conducting the election since they are on the scene and familiar with the physical circumstances surrounding the location of the polls. *Marvil International Security Service*, 173 NLRB 1260 (1968). See also *Faulhaber Co*., 191 NLRB 326 (1971).

For similar reasons, the *Milchem* rule was not applied in the context of the following factual situation: The election was conducted in a warehouse building, the voting area being located about 30 feet from the entrance. Conversations between three union representatives and several employees took place on a parking lot outside the warehouse. The Board held that the *Milchem* rule does not apply to conversations with prospective voters unless the voters are in the polling area or in line waiting to vote. *U-Haul Co. of Nevada,* supra; *Golden Years Rest Home*, 289 NLRB 1106 (1988); *Boston Insulated Wire Co*., 259 NLRB 1118 (1982); and *Harold W. Moore & Son*, 173 NLRB 1258 (1968). See also *American Medical Response,* 339 NLRB 23 (2003), and *Stevenson Equipment Co*., 174 NLRB 865 (1969) . The same reasoning was used in *Lach-Simkins Dental Laboratories*, 186 NLRB 671 (1970), where the union held a luncheon before and during the time the polls were open, but it was held outside of the polling area; employees were not compelled to attend; those who chose to attend had to go out of their way, past the entrance to the polling area; and the value of the sandwiches and soft drinks was not considered sufficient to influence the voting.

A single isolated violation *Milchem, Inc*., 170 NLRB 362 (1968), of *Milchem* was held insufficient to set aside the election where the vote of the employee addressed was not dispositive of the election. *Mead Corp.,* 189 NLRB 190 (1971). Compare *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984).

It should also be noted that an election will not be set aside where the rule was violated by the observer for the losing party in the election. *General Dynamics Corp*., 181 NLRB 874 (1970).

In *Pearson Education, Inc.*, 336 NLRB 979 (2001), the Board found that the posting of an antiunion poster near the polling site was objectionable. Accord: *American Medical Response,* supra.

For discussion of the third party conduct, see section 24-326.

24-443 Raffles, Gifts, and Contests

378-2897

378-4284

a. Raffles

In *Atlantic Limousine*, 331 NLRB 1025 (2000), the Board adopted a new rule barring "employers and unions from conducting a raffle if (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled

opening of the polls and ending with the closing of the polls." Accord: *Ryder Student Transportation Services*, 332 NLRB 1590 (2000) (conditioning a raffle on a certain number of employees voting); and *Allenbrook Healthcare Center*, 331 NLRB 1065 (2000) (raffle conducted during balloting).

The Board in *Atlantic Limousine* also concluded, however, that election raffles held outside of the 24-hour period would be scrutinized to determine whether "they involve promises or grants of benefit that would improperly affect employee free choice; or whether they allow the employer to identify employees who might or might not be sympathetic, and thus to learn were to direct additional pressure or campaign efforts. Applying this test, the Board set aside the election in *BFI Waste Systems*, 334 NLRB 934 (2001).

b. Gifts

Gifts may not be given to employees as an inducement to secure employee support of a Board election. *General Cable Corp*., 170 NLRB 1682 (1968.

In *B & D Plastics*, 302 NLRB 245 (1991), the Board summarized its test for determining whether benefits or gifts amount to objectional conduct:

> *Gulf States Canners*, 242 NLRB 1326 (1979). To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant of announcement of such benefits. See *Speco Corp*., 298 NLRB 439 fn. 2 (1990); *United Airlines Services Corp*., 290 NLRB 954 (1988); *May Department Stores Co*., 191 NLRB 928 (1971).

In *B & D*), the Board found that the grant of a day off 2 days after the election was objectionable. See also *Shore & Ocean Services*, 307 NLRB 1051 (1992), in which the granting of two benefits, a change in overtime computation and the providing of uniforms, within a short time after learning the petition was filed was objectionable. But see *Emery Worldwide*, 309 NLRB 185 (1992), in which the outcome of a bonus competition was announced the day before the election. The Board found that timing alone is insufficient to make an otherwise unobjectionable announcement objectionable. Generally speaking, the distribution of inexpensive pieces of campaign propaganda such as buttons, stickers, or T-shirts is not objectionable. Compare *R. L. White Co*., 262 NLRB 575 (1982), and *Nu Skin International*, 307 NLRB 223 (1992) (T-shirts not objectionable), with *Owens-Illinois, Inc*., 271 NLRB 1235 (1984) (free jackets found objectionable). Similarly announcement of a postelection victory party was not deemed objectionable. *Raleigh County Commission on Aging*, 331 NLRB 924 (2000)**.**

In *Comcast Cablevision-Taylor,* 338 NLRB 1089 (2000), the Board set aside an election after an adverse decision by the Sixth Circuit. The Circuit found that a union promise of a trip to Chicago after the election (a $50 value) was objectionable.

Elimination of a benefit (access to bulletin board) during the election campaign was objectionable. *Bon Marche*, 308 NLRB 184, 185 fn. 7 (1992), and dissent. See also *Chicagoland Television News*, 328 NLRB 367 (1999); *River Parish Maintenance*, 325 NLRB 815 (1998); and *Chicago Tribune*, 326 NLRB 1057 (1998) (paying for attendance at party found objectionable).

c. Contests

In a series of cases, the Board has found that contests in which a prize is awarded for answering questions about the election campaign where employees are required to sign their names is objectionable. See *Melampy Mfg. Co*., 303 NLRB 845 (1991), and cases cited therein.

See also *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000) (questionnaire amounted to polling).

The Board evaluates all the circumstances surrounding raffles that are held in connection with an election in deciding whether or not they are objectionable. These circumstances are described in *Grove Valve & Regulator Co*., 262 NLRB 285 (1982). See also *Sony Corp of America*, 313 NLRB 420 (1993), where the Board found that the value of the prize was not sufficiently high to be objectionable. See *Bionetics Corp*., 323 NLRB 639 (1997), for a discussion of late filed contention concerning an employer request that an employee distribute raffle tickets. See also *Arizona Public Service Co.*, 325 NLRB 723 (1998), distinguishing *B & D* (payment cases) from *Sony* (raffles).

24-444 Campaign Insignia

378-2847-8400 et seq.

378-8440

The wearing at the polls by observers of buttons or other insignia merely bearing the name of their union is not prejudicial to the fair conduct of an election. *Electric Wheel Co*., 120 NLRB 1644, 1646 (1958). And viewing the identity and special interests of employer observers as not reasonably presumed to be less well known than that of union observers, the Board holds that the impact on voters is not materially different "whether the observers wear prounion or antiunion insignia of this kind. (A hat with the words 'Vote No.')" *Larkwood Farms*, 178 NLRB 226 (1969), and *Fiber Industries*, 267 NLRB 840, 850 (1983).

Factual situations differ in many instances. In *Mar-Jac Poultry Co*., 123 NLRB 1571 (1959), the employer closed down its operations one-half hour before voting on election day, and some employees walked around the plant at such time wearing handmade paper hats lettered with words "Vote No." An objection to the election on this ground was found to be without merit. In *Delaware Mills*, 123 NLRB 943 (1959), an employee, whose vote had been challenged, was required to sit at the polling place. She wore a coat, which was unbuttoned, revealing a T-shirt which bore the printed letters "TWUA," and on her coat she wore a button with words "Vote Yes." An objection primarily based on this behavior was overruled, the Board finding that her presence, "even if she in fact waved and smiled at the voters," did not tend to so influence the voters as to warrant setting aside the election. In *Sewanee Coal Operators' Assn*., 146 NLRB 1145 (1964), the Board held that the presence of a crowd or a massing of voters at the entrance to the polling place and placard electioneering by unidentified persons on behalf of a union in the area outside the polls, standing alone, did not impair the exercise of free choice in the election. The wearing of T-shirts by union observers, bearing the union name and emblem in such a manner as to be visible to the voters, and the congregating of persons in an area of the polls during the election wearing the same type shirts were raised by way of objection in *R. H Osbrink Mfg. Co*., 114 NLRB 940 (1955), but found without merit. The Board has consistently held that wearing stickers, buttons, and similar campaign insignia by participants as well as observers at an election is, without more, not prejudicial. See also *Furniture City Upholstery Co*., 115 NLRB 1433 (1956). See CHM section 11310.4 indicating that no insignia is preferred but not required of observers.

A significant distinction should be drawn between the situation involved in the above cases and one in which the employer makes badges or other campaign insignia available to employees.

Illustrative of the latter is *Macklanburg-Duncan Co*., 179 NLRB 848 (1969), where the employer not only utilized its supervisory personnel in furtherance of its campaign by having them wear buttons and T-shirts displaying proemployer and antiunion propaganda, but intended via the supervisors to make the antiunion materials readily available to employees who, by electing whether or not to wear them, would disclose their respective choices. The Board found such tactics constituted unlawful interference with the election. See also *Garland Knitting Mills*,

170 NLRB 821 (1968), enfd. in material part 414 F.2d 1214 (D.C. Cir. 1969); and *Chas. V. Weise Co*., 133 NLRB 765 (1961). Compare *Black Dot, Inc*., 239 NLRB 929 (1978), in which the Board found the availability of such buttons was not objectionable as long as supervisors were not involved in distribution. See also *Columbia Alaska Regional Hospital*, 327 NLRB 876 (1998). But see *Gonzales Packing Co*., 304 NLRB 805 (1991); *Barton-Nelson, Inc*., 318 NLRB 712 (1995); and *Circuit City Stores,* 324 NLRB 147 (1997), where the material—vote no stickers in *Gonzales*, antiunion hats in *Barton*, and mugs in *Circuit City*—was distributed by supervisors.

24-445 Checking Off Names of Voters

370-3533-4050-2500

378-2857

378-4260

378-5625-7000

As already indicated, Board policy prohibits the keeping of a list, apart from the official voting list, of persons who have voted in the election. *International Stamping Co*., 97 NLRB 921 (1951). Thus, where one of the union representatives had a sheet of paper in his hand and, as employees passed him to enter the store where a Board election was being conducted, he made notations of the names of employees who had voted, the election was set aside. *Piggly-Wiggly #011*, 168 NLRB 792 (1967). Although it is the policy of the Board to prohibit the keeping of a list of persons who have voted in the election, it is necessary to affirmatively show or to infer from the circumstances that the employees knew that their names were being recorded. See *Days Inn Management Co*., 299 NLRB 735 (1992); and *Hallandale Rehabilitation Center*, 313 NLRB 835 (1994). Where no such affirmative evidence of this exists or where it cannot be inferred from the circumstances of the case, the election is sustained. *A. D. Juilliard & Co*., 110 NLRB 2197, 2199 (1954). See also *Cross Pointe Paper Corp.,* 330 NLRB 658 (2000); *Southland Containers*, 312 NLRB 1087 (1993), the cases cited therein; and *Textile Service Industries*, 284 NLRB 1108 (1987), "in which the Board found unobjectionable an observer's writing, in addition to hash marks, 'unknown words' and recognized as names while attempting to conceal the paper." *Cross-Pointe Corp*., 315 NLRB 714 (1994).

For example, an observer for the employer, during the morning voting session at one of the polling places, used a copy of the voting list to determine whether the voters as they appeared to vote were among those he had been instructed to challenge. Although he began by checking off voters on his list, doing so only as to the first few voters, he discontinued such practice when warned against it by the Board agent, nor was it clear that any voter was aware his name was being checked off. The Board concluded that any breach of the rule which may have occurred was de minimis and did not constitute a basis for invalidating the election. *Tom Brown Drilling Co*., 172 NLRB 1267 (1968).

Lists of those to be challenged are of course permitted. See *Cerock Wire & Cable Group*, 273 NLRB 1041 (1984), and CHM section 11338.2, but the Board prefers that the observer not use a duplicate *Excelsior* list, *Mead Southern Wood Products*, 337 NLRB 497 (2002).

In two rather interesting cases, the Board did permit the employer to maintain lists where they were unrelated to the actual polling itself. *American Nuclear Resources*, 300 NLRB 567 (1990) (list maintained for security reasons); and *Red Lion*, 301 NLRB 33 (1991) (list maintained for payroll reasons).

See also the discussion of Observers at section 24-424, supra.

24-446 Filing Lawsuits

In *Novotel New York*, 321 NLRB 624 (1996), a divided Board found that in the circumstances there the union did not engage in objectionable conduct in filing a FLSA lawsuit prior to an election. In doing so the Board analyzed the case in light of the court's two-part test of *Nestle*

Dairy Systems, 311 NLRB 987 (1993), enf. denied 46 F.3d 578 (6th Cir. 1995). The elements of that test are:

(1) Whether the articles offered employees are sufficiently valuable to have potential to influence the vote.
(2) Whether the potential to influence votes is without relation to the merits of the election.

In *Superior Truss & Panel, Inc*., 334 NLRB 916 (2001), the Board overruled employer objections to a union lawyer's comment at a union meeting that the union would file unfair labor practice charges after the election based on employee concerns about supervisory harassment**.** In overruling the objection, the Board noted that the "benefit" here was the filing of an unfair labor practice charge. In doing so, the Board noted that its decision was consistent with the rationale of the D.C. Circuit in *Freund Baking Co.*, 165 F.3d 928 (D.C. Cir. 1999), which had distinguished filing charges from filing lawsuits.

24-500 The *Lufkin* Rule

370-2817-3366

In *Lufkin Rule Co*., 147 NLRB 341 (1964), at the request of the party whose objections to election conduct had been sustained, the Board directed its Regional Director to include in the notice of the repeat election the fact that a new election would be conducted because the employer's preelection conduct had interfered with the employees' exercise of a free and reasoned choice and thus warranted setting aside the original election. *Fieldcrest Cannon, Inc*., 327 NLRB 109 (1998).

The employer, in opposition to the union's request, contended that to grant the motion would unduly prejudice it because such a statement, having the *imprimatur* of the Board, would suggest to the employees that in view of the employer's misconduct the Board favored a vote for the petitioner in the second election. The Board rejected this contention, stating that it did "not believe that the notice in any way indicated that the Board favors the petitioner in the second election" and that the "primary purpose of the notice is to provide official notification to all eligible voters, without detailing the specific conduct involved, as to the reason why the elections were set aside."

Prior to *Lufkin Rule Co*., supra, Board had "seldom heretofore exercised its discretion to incorporate in the election notice any language which might explain the basis for the holding of a new election." 29 NLRB Ann. Rep. 63 (1964). As a result of *Lufkin*, the Board may, in appropriate circumstances, exercise this discretion.

The notice reads as follows:

NOTICE TO ALL VOTERS

> The elections conducted on [insert date] were set aside because the National Labor Relations Board found that certain conduct or the Employer [Union] interfered with the employees' exercise of a free and reasoned choice. Therefore, new elections will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

For an application to this rule, see, for example, *Snap-On Tools, Inc.,* 342 NLRB 5 (2004); and *Bush Hog, Inc*., 161 NLRB 1575 (1966). See also *Monfort of Colorado*, 298 NLRB 73 (1990); and *SDC Investment*, 274 NLRB 556 (1985). In *Miller Industries,* 342 NLRB 1047 fn. 4 (2004), the Board denied a request for a special notice but did direct a notice of election in accordance with *Lufkin* rule.

If the *Lufkin* language is not used, the notice of election should be modified to the extent that it should explain that the election being announced is a "rerun of the election held on [insert date of original election]."

See section 22-106, for discussion of Board policy of including statement of reasons for rescheduling elections in the Notice of Election.

24-600 Postelection Unit Modifications

Under certain circumstances, the Second Circuit has held that a postelection unit modification may affect the outcome of an election.

For a discussion of the cases, see section 3-880.