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BOOK REVIEW

UNION REPRESENTATION ELECTIONS: LAW AND REALITY. By Getman,[1] Goldberg,[2] and Herman.[3] New York: Russell Sage Foundation. 1976. Pp. 218.

Reviewed by Abigail Cooley Modjeska[4]

Much labor law doctrine rests upon a myriad of assumptions and presumptions which are, perhaps by definition, essentially untested in whole or in part. Their virtue in some areas may simply lie in the fact that more often than not they "work"; that is, they serve as guides to and regulators of conduct.[5] When the predicate for the assumption is demonstrably unfounded, however, or when the conduct in fact does not require regulation, the continued utilization of the assumptions can hardly be defended.[6] Rarely are these assumptions tested or challenged upon bases more substantial than emotion or partisanship. Professors Getman, Goldberg and Herman have produced such a rarity. They have made the test, they have posed the resultant challenge, and they have done so exceedingly well.

The focal point of the authors' study is the regulation by the National Labor Relations Board of election campaigning in representation elections conducted by the Board under the National Labor Relations Act.[7] The Supreme Court long ago gave the Board substantial discretion in this area,[8] and the

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5. *See, e.g.*, Ray Brooks v. NLRB, 348 U.S. 96 (1954).

6. *See, e.g.*, Local 60, Carpenters v. NLRB, 365 U.S. 651 (1961); Local 357, Teamsters v. NLRB, 365 U.S. 667 (1961). *See generally* Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974).

7. 29 U.S.C. §§ 159(e)(1) (1970). Section 9 of the Labor Management Relations Act of 1947 provides for the holding by the Board of secret ballot elections to determine the employees' majority representative for collective bargaining. There were 8,638 conclusive representation elections conducted by the Board in cases closed in fiscal 1976. *Forty-First Annual Report of the National Labor Relations Board*, 17-18 (1976). Over 8,000 of these elections were collective bargaining elections, 611 were decertification elections, and 111 were union-shop deauthorization elections.

8. *See* NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946): NLRB v. Waterman

Board has frequently exercised that discretion with marked unrestraint. Since the earliest days of the Act, the Board has charged itself with the duty of ensuring that a representation election is conducted under "laboratory conditions"—*i.e.*, conditions which "enable employees to register a free and untrammelled choice for or against a bargaining representative,"[9] and to this end has set aside elections whenever it finds "[c]onduct that creates an atmosphere which renders improbable a free choice."[10] Having assumed this gigantic task, the Board has devoted much time and energy to determine what conduct rises to the forbidden level.

The authors posit that the Board's evaluation of the legitimacy of campaign tactics and their effect on the election outcome is predicated upon certain fundamental assumptions concerning the dynamics of employee voting, to-wit: (1) employees are unsophisticated about labor relations, and receive most of their information from the campaign; (2) they pay close attention to the campaign; (3) whatever precampaign inclinations they have for or against union representation are tenuous and may be easily altered by all unlawful campaign tactics and some lawful ones; and (4) because of the employer's economic power over the employees, they are particularly susceptible to the employer's campaign propaganda and will interpret any ambiguous statements the employer makes concerning unionism as threats of reprisal or promises of benefit. On the basis of these assumptions, the Board will set aside an election whenever it finds unlawful conduct, including acts of reprisal against union adherents[11] or grants of benefits designed to influence the outcome of the election.[12] It will also set aside elections when the

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S.S. Corp., 309 U.S. 206, 226 (1940); "[A]s we have noted before, Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *See also*, NLRB v. Mattison Machine Works, 365 U.S. 123 (1961).

9. General Shoe Corp., 77 N.L.R.B. 124, 126 (1948).

10. *Id.*

11. *See, e.g.*, Cornelius American, Inc., 194 N.L.R.B. 909 (1972). Such conduct may also violate Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3) (1970)) which provides in pertinent part that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

12. *See, e.g.*, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). Such conduct may also violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1) (1970)) which provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act, which rights include the right to "self-organization, to form, join, or assist labor organizations . . . and . . . to refrain from any or all of such activities . . . ." In *Exchange Parts*, the Supreme Court found the grant of benefits to imply a threat of reprisals forbidden by section 8(a)(1) on the following grounds:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist

unlawful tactics consist solely of speech, as, for example, when the employer has interrogated or polled the employees concerning their union sympathies without providing adequate safeguards against their being coerced,[13] or when he has made threats of reprisal[14] or promises of benefit.[15] Until very recently, the Board also set aside elections when there had been no unlawful activity[16] if one of the parties had made assertions of fact which were found to constitute "a substantial departure from the truth . . . which . . . may reasonably be expected to have a significant impact on the election."[17] And finally, it will set aside elections in a variety of other circumstances deemed destructive of the "laboratory conditions" necessary for a fair and free election, as, for example, when either party makes a campaign speech to massed assemblies of employees within twenty-four hours of the election,[18] or when outside parties create an emotional atmosphere not conducive to rational choice,[19] or when there is an appearance of unfairness or irregularity in the election proceedings.[20] In those cases in which there have been no unfair labor practices committed, or there have been only "minor or less extensive

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inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

375 U.S. at 409.

13. *See, e.g.*, Blue Flash Express, Inc., 109 N.L.R.B. 591 (1954); Struksnes Construction Co., 165 N.L.R.B. 1062 (1967).

14. *See, e.g.*, Thomas Products Co., 167 N.L.R.B. 732 (1967).

15. *See, e.g.*, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964); Hudson Hosiery, 72 N.L.R.B. 1434 (1947).

16. Section 8(c) of the Act (29 U.S.C. § 158(c) (1970)) provides that:

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

In General Shoe Corp., 77 N.L.R.B. 124 (1948) the Board held that Section 8(c) was inapplicable to representation proceedings, and also that "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *Id.* at 126.

17. Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962). In Shopping Kart Food Market, Inc., 228 N.L.R.B. No. 190, decided April 8, 1977 and discussed *infra*, the Board overruled *Hollywood Ceramics.*

18. *See, e.g.*, Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1955).

19. *See, e.g.*, Sewell Mfg. Co., 138 N.L.R.B. 66 (1962) (appeals to racial prejudice); Universal Mfg. Corp., 156 N.L.R.B. 1459 (1966) (linking the trade union movement to Communism).

20. *See, e.g.*, Athbro Precision Engineering Corp., 166 N.L.R.B. 966 (1967) (Board agent fraternizing with one of parties); Austill Waxed Paper Co., 169 N.L.R.B. 1109 (1958) (ballot box left unattended for short period of time).

unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order,"[21] the Board will simply direct a re-run election. In those cases in which it finds that the employer has committed unfair labor practices of such serious nature that a fair re-run election is not possible, it generally issues an order requiring the employer to bargain with the union seeking recognition regardless of the outcome of the first election.[22]

The accuracy of the assumptions underlying this vast body of detailed and complex case law, and the wisdom of the Board's reliance upon these assumptions to create that law, have often been questioned.[23] Until now, however, these critics had little to substantiate their doubts, save perhaps some equally questionable assumptions of their own. Thus, the authors of this book have provided a long-awaited and much-needed service: they have conducted a precise empirical study of the Board's assumptions. They did so by interviewing 1,239 employees who participated in thirty-one elections between February 1972 and September 1973.[24] Employees were interviewed twice—once shortly after the election was directed by the Board, to assess the employees' precampaign sentiments about union representation, and once immediately after the election, to determine their recall of the content of the campaign and to ascertain how they voted and why.

To anyone familiar with the voting behavior in the political elections, the result is not surprising;[25] the employees' views concerning union representation are virtually unaffected by both parties' campaign tactics. For instance, contrary to the Board's assumption that employees are unsophisticated about labor relations and have tenuous views regarding the value of union representation, the study revealed that many employees had had personal experience with unions or union representation, and that a large majority of the employees interviewed had predispositions to vote for or against the union which persisted throughout the campaign regardless of the tactics employed. Indeed, by ascertaining at the outset of the campaign the employees' attitudes towards unions in general and their satisfaction with their current working conditions, the authors were able to predict the final vote with eighty-one percent accuracy. Moreover, authorization cards, typically

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21. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

22. *Id.*

23. *See, e.g.*, Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

24. For practical reasons, the study was limited to states under the jurisdiction of the NLRB regional offices in Chicago, Peoria, Cincinnati, Indianapolis and St. Louis.

25. *See, e.g.*, Bok, *supra* note 23, at 48.

signed by employees before the onset of the employer's campaign, accurately predicted the votes of seventy-two percent of the employees.[26]

Similarly, it appears that employees do not pay the close attention to the campaign which is assumed by the Board. Of an average thirty issues in company campaigns and twenty-five in union campaigns, employees recalled only ten percent and seven percent respectively, despite the fact that they were generally interviewed within two to four days after the election occurred. This fact suggests either that they paid little attention during the campaign, or that they quickly forgot everything they were told. Moreover, employees did not necessarily recall the issues central to the campaign, but recalled certain issues such as union promises to raise wages and prevent unfairness, whenever they were raised.[27] There was a high correlation between the reasons which employees gave for voting as they did and the issues raised in the campaigns. However, the authors conclude that the general predictability of the vote, regardless of campaign content, suggests that the campaigns which generally took a scatter-gun approach managed to touch upon issues already salient to voters in view of their existing dispositions, and not that views were formed or swayed by the campaign.

The data did not support the Board's assumption that employees perceive ambiguous statements by their employer as unlawful threats of reprisal or promises of benefits. However, it failed completely to support the Board's further assumption that unlawful employer campaign tactics significantly affect voting. Potential union supporters—i.e., those whose stated intent was to vote union or whose attitude predicted a union vote—voted for union representation in approximately the same proportion in elections characterized by employer unfair labor practices so flagrant as to require a bargaining order under Board standards as they did in those characterized by less serious unfair labor practices or by no unfair labor practices at all. Even in those elections characterized by discharges during the card signing campaign—long viewed by the Board as an employer tactic having particularly deleterious effects upon a union campaign[28]—employees who had signed union authoriza-

26. Of course, at the time the authors conducted their first interview, shortly after the Board's direction of election, the union had presumably already done sufficient campaigning to satisfy itself that a least 30% of the employees of the unit in question—the minimum required to obtain an election under Board procedures (*see* 29 C.F.R. § 101.18, (1976))—were interested in having a representation election.

27. As the authors point out, these issues correspond to opinions held by many employees prior to the campaigns, and thus may have been remembered because of their salience, or because employees expected the unions to make such claims.

28. *See* NLRB v. Entwistle Mfg. Co., 120 F.2d 532 (4th Cir. 1941), in which the court sustained a broad remedial order on grounds, *inter alia*, that the "discriminatory

tion cards did not switch their vote to the employer in significantly larger proportion than in any other elections, although they often, and often erroneously, perceived the discharges as discriminatorily motivated by the employer.

Having found that virtually all of the major assumptions relied upon by the Board in determining which campaign tactics to permit and which to prohibit are unfounded, the authors reach the conclusion that the Board should no longer regulate campaign tactics on the basis of those assumptions. Since union supporters are apparently not coerced by such campaign communications as threats of reprisal, promises of benefit, interrogations, or other speech, the Board should not set aside elections because such tactics have occurred, and should not find the tactics to violate section 8(a)(1) of the Act, which makes it unlawful for an employer to "interfere with, restrain, or coerce" employees in the exercise of their Section 7 rights.[29] For the same reason, grants of benefit should no longer be found violative of section 8(a)(1), or used as a ground for setting aside an election.[30] Discriminatory discharges or other acts of reprisal should also not be used to set aside the election, but would still be found violative of section 8(a)(3), thereby providing employees with their usual remedies of reinstatement and back pay under that provision.[31] Rules designed to preserve the appearance of fairness and regularity of Board proceedings, and other rules designed to insulate the employees from emotional or last minute appeals, should be abolished. Finally, bargaining orders, if retained at all, should be imposed automatically in cases of certain types of violations as a deterrent to the future commission of such conduct, and should not be made contingent upon dubious findings as to the possibility or likelihood of holding a fair re-run election.[32]

The authors recognize that there are arguments against such deregulation of the campaign, the most telling of which is that despite all of their findings, election results may still be affected by campaign tactics in some instances. Indeed, the authors' own statistics demonstrate that thirteen percent of the employees interviewed voted contrary to their original intent, that six percent

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discharge of an employee because of his union affiliations goes to the very heart of the Act." *Id.* at 536.

29. *See* note 12, *supra.*

30. This recommendation runs somewhat counter to NLRB v. Exchange Parts, 375 U.S. 405 (1964), in which the Supreme Court specifically found that the grant of benefits prior to an election implies a threat of reprisals forbidden by section 8(a)(1) of the Act.

31. The authors also suggest more stringent remedies against flagrant violators of the Act, including treble or punitive damages, loss of government contracts, and increased use of section 10(j) interim injunctive relief in section 8(a)(3) discharge cases.

32. *Cf.* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

were initially undecided, and that the votes of these two groups of employees, although not numerous, were sufficient to affect the election outcome in nine, or more than one quarter, of the elections studied. However, they take the position that there are not likely to be many cases where the number of voters affected by employer campaigns will be sufficient to deprive the union of a victory it would have had under existing law,[33] and that the reasons for deregulating Board elections far outweigh the risks.

There were probably many who doubted the capacity of the Board to react meaningfully to such a study, much less to change what appeared to be entrenched dogma. Surprisingly, and to its credit, the Board has already heeded and weighed the study, has questioned some prior assumptions, and has decided to abandon certain aspects of its election regulation. In *Shopping Kart Food Market, Inc.*,[34] a majority of the Board,[35] citing the results of this study, observed that "[t]he data cast doubt on the assumption that employees are unsophisticated about labor relations and are therefore easily swayed by campaign assertions"[36] and found "most significant" the fact that the votes of eighty-one percent of the employees could be predicted from their precampaign intent and attitudes.[37] It further found that the study suggested a "more accurate model of employee behavior,"[38] namely that the Board's rules in the area of election campaign regulation "be based on a view of employees as mature individuals who are capable of recognizing campaign

33. The switchers' reasons for voting as they did were apparently unrelated to any particular campaign theme. However, the date did show that those employees who were initially undecided or who were company supporters at the outset of the election campaign and who switched during the campaign to ultimately vote for the union—approximately 10% of the employees interviewed—were significantly more familiar with the union campaign than those who voted for the company. (No such correlation was shown between those who were initially undecided or union supporters who later switched to the company). Since the majority of the undecided who voted for the union had attended at least one union meeting, as had 48% of the switchers from company to union, the authors conclude that there was a causal relationship between familiarity with the union campaign and employees' votes. For this reason, and on grounds of fundamental fairness, the authors recommend that equal opportunities be provided to the union for access to the employees by requiring employers who hold campaign meetings on working time and premises, or who permit supervisors to campaign against the union on company premises to allow the union to also hold campaign meetings on working time and premises.

34. 228 N.L.R.B. No. 190 (April 8, 1977).

35. Members Penello and Walther, Chairman Murphy concurring, with Members Fanning and Jenkins dissenting. Because of political considerations the change may be short-lived. Member Fanning has been designated Chairman, and Member Walther has resigned, leaving room for a new Board appointment.

36. Shopping Kart Food Market, Inc., 228 N.L.R.B. No. 190, slip op. at 8.

37. *Id.*

38. *Id.*

propaganda for what it is and discounting it."[39] The majority accordingly held that campaign misrepresentations would no longer be a basis for setting aside elections, stating,[40]

> [B]ased on assumptions of employee behavior which we find dubious at best and productive of a host of ill effects, we believe that on balance the *Hollywood Ceramics* rule operates more to frustrate free choice than to further it and that the purposes of the Act would be better served by its demise. Accordingly, we decide today that we will no longer set elections aside on the basis of misleading campaign statements. . . .

The dissenters argued that regardless of the validity of the study,[41]

> [W]ere [the *Hollywood Ceramics*] standards to be relaxed—to the "almost everything goes" standard proposed by our colleagues—one result can be fairly predicted. Campaign charges and countercharges would surely escalate. For the parties will campaign, and they will campaign on the assumption that what they say may make the difference. As "bad money drives out the good," so misrepresentation, if allowed to take the field unchallengeable as to its impact, will tend to drive out the responsible statement.[42]

It is beyond the scope of this review to evaluate either the methodology employed in making the study or the factual accuracy of its conclusions. Hopefully it will at the very least serve to raise the level of debate concerning the Board's role in election proceedings from one mired in guesswork and biases to one founded more firmly upon empirical data. There will undoubtedly be those who utilize this study to support their own doubts concerning the Board's premises and rules. And there will be others, like the dissenting Board members, who fear that whatever the study indicates concerning employee attitudes and proclivities, the risks inherent in any relaxation of the Board's rules outweigh the possible gains. Whatever one's predilections, the authors have achieved their aim of causing the Board to question, debate and change its encrusted policies, and have provided an empirical basis for such a change. For this reason alone, their timely and articulate study deserves the close attention of all who concern themselves with the Board's election processes—from labor organizers and company attorneys to mere Board watchers.

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39. *Id.*

40. *Id.* at 9, *citing* Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962).

41. *Id.* at 18. Both Members Fanning and Jenkins were critical of the study, and Member Jenkins dissented further in order to make additional specific criticisms of both the authors' methodology and the conclusions which they drew from their data. *Id.* at 24-26.

42. *Id.* at 18.