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AFTERTHOUGHTS ON THE SHORT-LIVED EXPERIMENT IN DEREGULATION OF REPRESENTATION ELECTIONS

David B. Ross*

UNION REPRESENTATION ELECTIONS: LAW AND REALITY. By Julius G. Getman, Stephen B. Goldberg, and Jeanne B. Herman. New York: Russell Sage Foundation. 1976. Pp. xvii, 218. \$7.50.

The recent decision of the National Labor Relations Board in *General Knit of California, Inc.*¹ perpetuates a controversy over a monograph by Professors Getman, Goldberg, and Herman, entitled *Union Representation Elections: Law and Reality*. In *General Knit*, the Board once again announced its intention to overturn representation-election results whenever a winning party made substantial misrepresentations which might have significantly influenced the election results. The opinion in *General Knit* reinstated the *Hollywood Ceramics Co.*² standard for regulating the content of election campaigns, which the Board had abandoned less than two years earlier in *Shopping Kart Food Market, Inc.*³

The majority in *Shopping Kart* had found support for their decision that the Board should no longer probe the truth or falsity of parties' campaign statements in the research which Professors Getman and Goldberg⁴ later (with Herman) expanded into their present book. The opinion of *General Knit*'s new majority (a majority composed of Chairman Fanning and Member Jenkins, who both dissented in *Shopping Kart*, and Member Truesdale, who was recently appointed to the Board) accordingly imputed some of the blame for the Board's misdirection on its earlier acceptance of Getman, Goldberg, and Herman's conclusions.

The Board's sudden reversal of *Shopping Kart* can only exacerbate the notable instability of Board doctrine in the area of union representation elections, although as Professor Bok⁵

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1. 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (1978).

2. 140 N.L.R.B. 221 (1962).

3. 228 N.L.R.B. 1311 (1977).

4. Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentation: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976).

5. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 40 (1964).

pointed out, the frequent changes in Board policy concerning campaign regulation probably result from a fundamental uncertainty over the nature of the election process and of voter behavior rather than from shifts in Board politics. Far removed from the turmoil of a hotly contested election and unencumbered by systematic research into the influences upon elections, the Board and the courts normally derive their policies from axioms plucked from judicial opinions. Justice Harlan's theory of the "fist-inside-the-velvet glove"⁶ or Judge Learned Hand's classic warning on ambiguous campaign statements⁷ are often impossible to apply in concrete situations but furnish a conventional wisdom where the influence of campaign statements and conduct on voters is unknown. Similarly, the Supreme Court's decision in *NLRB v. Gissel Packing Co.*⁸ supplies a formula for the Board's regulatory inquiries but calls for case-by-case distinctions which probably outstrip the Board's assessment powers.

Professor Bok reasoned in a 1964 article⁹ (which inspired the Getman studies) that campaigns will in many circumstances be regulated, by whatever a priori standard, in ignorance of the ends achieved. He argued, then, that union campaign regulation may serve a dubious purpose, waste agency resources, and may as often as not be harmful.

Against Bok's contention that, given our ignorance of the election process, regulation of election conduct might not be purposeful, Getman, Goldberg, and Herman argue for a laissez-faire approach based on their research, which suggests that campaign conduct, by and large, has little or no influence on voters. Because they refute rather than merely question the old axioms, theirs is a more startling position than Bok's, and it has provoked highly critical reactions. Unions and employers, of course, invest considerable effort in developing campaign issues, presumably because their experience has shown such campaigns to be effective. And to many practitioners, as well as to the Board, the authors' rejection of that experience is unjustified by their data,

6. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

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

8. 395 U.S. 575 (1969). Under *Gissel Packing*, the Board may set aside election results and order a rerun after finding "minor" unlawful campaign conduct; if it finds unlawful campaign conduct extensive or serious enough to make a fair rerun impossible, it may order the employer to bargain with the union on the strength of a showing, based on authorization cards, that the union at one time had a majority, even though it lost the election.

9. Bok, *supra* note 5.

particularly as to the critical groups of undecided or "switch" voters.

The Challenge to the Board's Model of Voting Behavior

Getman, Goldberg, and Herman argue that the Board, in its decisions requiring pristine "laboratory conditions"¹⁰ for all elections, has developed an erroneous model of employee voting behavior. The authors demonstrate that Board decisions characterize employees as attentive to campaign issues, unsophisticated in labor relations, and easily manipulated by ambiguous statements which may be interpreted as threats or promises. Getman, Goldberg, and Herman challenge this view. They analyzed thirty-one elections (which were especially selected for the vigor of the employer's campaign), and interviewed (twice) 1,239 employees (p.33).¹¹ Their data suggest that voters in a representation campaign have strong and stable predispositions which depend on their attitudes toward unions and on their own working conditions. Eighty-one percent of the surveyed employees voted in accord with those predispositions (p. 62). Indeed, even unlawful campaign tactics, which occurred in twenty-two of the elections, did not alter pre-campaign attitudes (pp. 115-16).

Relying on psychological and behavioral theories, the authors contend that these pre-campaign attitudes make up a "cognitive structure" through which campaign propaganda is filtered and assimilated and that the attitudes can not be easily changed by new information. Employees inclined to vote for the union expect the company to campaign against the union and discount its arguments (pp. 85-86, 124 n.20). In fact, both union and company supporters are largely inattentive to the campaign; on the average they recalled only ten percent of the company issues and seven percent of the union issues (pp. 75-76).

According to the authors, then, the high correlation between employees' pre-campaign attitudes and their votes refutes the Board's model of voter behavior and casts doubt on its requirement of "laboratory conditions." This conclusion is strongly supported by the statistical analysis and probably does not contradict the experience of most practitioners, however skeptical some commentators and the Board may be. The study's implication is

10. *E.g.*, General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

11. The first interview was held an average of eleven days after the direction of an election, which is early in normal campaigns but not entirely before the campaign begins. The second interview was held immediately after the election.

unavoidable: the Board should not substantially regulate the content of campaigns, at least in elections where the margin of victory exceeds twenty percent.

Influence of Campaigns on the Undecided or "Switch" Voter

We have seen that eighty-one percent of the voters studied followed their predisposition. The study's principal problem lies in its treatment of the remaining nineteen percent — the six percent who were undecided voters and who expressed no pre-campaign intent and the thirteen percent who "switched" to vote contrary to their original intent. As the authors note, these voters, although few in number, determined the outcome in nine (or twenty-nine percent) of the thirty-one elections (p. 103).

The authors reached the following conclusions about the undecided and "switch" voters (pp. 103-08):

(1) The undecided and switch voters who ultimately voted for the company were no more familiar with the company's campaign than such voters who ultimately voted for the union, nor were they more familiar with the company's campaign than the employees who had originally intended to vote for the company and did.

(2) The undecided and switch voters who ultimately voted for the union were significantly more familiar with the union's campaign than such voters who ultimately voted for the company. They were not, however, more familiar with the union's campaign than the employees who originally intended to vote for the union and did.

(3) A large majority of the undecided and switch voters voted for the company. More specifically, fourteen percent of all the voters may have been influenced by the company campaign and only five percent by the union campaign.

(4) Neither the "undecideds" nor the "switchers" were very familiar with either campaign.

Since the authors collected no data that could identify *when* the new voting intentions emerged, they can only speculate about the causal relationship between the union campaign and union vote by the undecided and switch voters. Nevertheless, they do conjecture that union campaign information won the new pro-union votes, since "[a] change in those attitudes during the brief campaign period without some new information about the Union seems unlikely" (p. 106).

Although logic suggests that the pro-company votes by the

undecided and switch voters should be similarly attributed to the company's campaign, the authors' data were inconclusive. They could not discover any company campaign issues that changed attitudes, even when the company used coercive tactics, nor could they say that those who voted for the company were familiar with the company's campaign. Instead, they conjecture that any company campaign, whatever its content, because it typically occurs after the union has campaigned unopposed for authorization cards, demonstrates that management is aware of employee dissatisfactions and that that is enough to make employees reconsider their pro-union attitudes (p. 108).

The conclusion that company campaign issues do not influence undecided or switch voters certainly conflicts with the collective experience of most practitioners, who generally believe that in close elections issues make a difference. Moreover, if the authors may speculate that union campaign information caused five percent of all the voters to support the union, may not the Board in *General Knit* similarly speculate that company campaign information caused the fourteen percent who were undecided or were switch voters to vote against the union? Indeed, the Board finds support for its view in the authors' conclusion that the mere existence of a company campaign may influence voters since, as it asks "[H]ow could the employer's campaign have been free of factual assertions?"¹² That the authors could not identify any campaign issues that changed attitudes does not mean that such issues had no effect.

The authors missed the significance of campaign issues because they did not design their field investigations to focus primarily on the undecided and switch voter. They only categorized voters initially as pro-union, pro-company, or undecided, and they did not measure in depth the strength and characteristics of voter attitudes. Indeed, they only asked seven questions about working conditions, and they limited answers to a three-point scale: satisfied, dissatisfied, or uncertain. Employee attitudes toward the union were also scored on a three-point scale: agree, disagree, and don't know or uncertain.

In short, the authors' attitude survey was not designed to reveal deep-seated but unarticulated feelings; and in fairness, their limited time resources made it difficult to do so. Thus, for example, the data showing that most employees feel that wage

12. *General Knit of Cal., Inc.*, 239 N.L.R.B. No. 101, at 11 n.24, 99 L.R.R.M. 1687, 1690 n.24 (1978).

issues are more important than job security issues contradicts the experience of practitioners that issues of job security are far more important than issues of wages. These doubts about whether the attitude survey revealed employee attitudes and adequately probed the cause of changed attitudes plus the authors' failure to test the attitudes on at least one more occasion prior to the election — to learn how new attitudes develop over time — make questionable the authors' conclusion that switching to the company is "more likely to be due to the intensification of currently held attitudes than to new information conveyed in the employer's campaign" (p. 145).

Effect of Unlawful Campaigning on Undecided and Switch Voters

The authors suggest that even unlawfully coercive employer campaigns do not significantly influence the voting decisions of a large majority of employees. Again, however, the critical question persists about the influence of coercive campaigning on the undecided or switch voters, most of whom voted against the union. Despite the authors' inability to identify why the undecided or switch voters change their attitudes, the authors did, by isolating and comparing the effects of "clean" and coercive campaigns, persuasively show that the percentage of undecided voters who voted for the company and the percentage of voters who switched from pro-union to pro-company were not significantly greater in unlawful elections than in "clean" elections. They also concluded that the small percentage of voters influenced by campaign misconduct made a bargaining order an inappropriate remedy (pp. 115-16).

What makes these results particularly convincing is the authors' corroborating analysis of voter perception of unlawful tactics. Approximately one third of the employees reported that the employer had used one or more unlawful campaign tactics, whether or not unlawful campaigning actually occurred. Reports of unlawful conduct were not even more frequent when the conduct was coercive enough to merit a bargaining remedy order (pp. 117-18).¹³ Thus, because voters believe unlawful tactics occur and

13. To isolate the variables of unlawful and seriously unlawful campaign tactics, the authors took both the election cases in which official charges were lodged and the cases in which no charges were filed. They asked an experienced administrative law judge (who was, of course, acting unofficially) to decide whether or not a valid objection might have been raised to the campaign and the materials used in it. The judge also determined whether a bargaining order would have been appropriate.

Under Board standards, there were campaign violations in twenty-one of the thirty-

perhaps expect them, voters are not influenced when they do in fact occur.

Conclusion

Even though Getman, Goldberg, and Herman have persuasively shown that most pre-election attitudes are stable, they will probably not dissuade companies from attempting to identify and influence their employees' attitudes toward the company and the union. Moreover, the study has also clearly failed to persuade the Board, at least for the time being, to limit regulating campaign conduct. The authors' most valuable contribution may be their use of empirical research and analysis to make the debate about Board regulation of election campaigns better informed and more rational. The authors' definition and isolation of variables, their logical experimental design and careful data collection, and their use of statistical tools to interpret those data produce meaningful results that can be challenged or verified. Their data raise further questions but expand our understanding about the extent to which Board regulation is appropriate.

one elections. Since the identification of unlawful conduct was wholly uncorrelated with the perception of unlawful tactics by the voters, the authors reasonably question whether or not Board investigations and findings are necessary.