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CASES NOTED

LABOR LAW—INFLAMMATORY RACIAL PROPAGANDA IN REPRESENTATION ELECTIONS

The National Labor Relations Board held a representation election in two Georgia plants, located in towns of 3,000 and 1,000 population. The employer used propaganda pictures and publications which portrayed unions as emphasizing racial integration.¹ The union lost the election. *Held*, election set aside and new election ordered: propaganda which "can have no purpose except to inflame the racial feelings of voters" is not permissible in representation elections, although statements on racial matters which are "temperate in tone, germane and correct factually" will be tolerated. *Sewell Mfg. Co.*, 138 N.L.R.B. No. 12, 50 L.R.R.M. 1532 (Aug. 9, 1962).²

1. Two weeks before the election the employer mailed to its employees a large picture showing a closeup of a Negro man dancing with a white lady; both were unidentified. The picture was captioned in bold letters, "The C.I.O. Strongly Pushes and Endorses the F.E.P.C." On the same day the employer also sent the employees a reproduction of a 1957 front page of the *Jackson (Miss.) Daily News*, featuring a four-column picture of a white man dancing with a Negro lady. The picture was captioned:

UNION LEADER JAMES B. CAREY DANCES WITH A LADY FRIEND

He is President of the IUE

Which Seeks to Unionize Vickers Plant Here

Accompanying this picture was a story headed, "Race Mixing Is an Issue as Vickers Workers Ballot." (The Board noted that the IUE was not the petitioner in the instant case.)

The employer also distributed to employees copies of a publication called *Militant Truth* for four months preceding the election. This is a monthly paper, published in Greenville, S.C. Samples of writing from *Militant Truth* follow:

"It isn't in the interest of our wage earners to tie themselves to organizations that demand racial integration, socialistic legislation, and full range of communist conspirators.

"Another factor that merits consideration is the large percentage of union victories in plants that employ all, or nearly all, Negro labor. Because the communists always operate under the guise of being 'the great uplifters' of 'the underprivileged,' and promise social equality to the Negro, it is easy to understand why many Negroes are more easily influenced and misled by the radical labor union organizers."

Two days before the election the employer's president sent a letter to employees saying that one of the reasons he would vote against the union is that he would "object to paying assessments so the union can promote its political objectives" such as the National Association for the Advancement of Colored People and the Congress of Racial Equality. A week previous to this the local newspaper had reprinted a letter signed by Walter Reuther and James B. Carey, enclosing a check to CORE, to "be used in connection with expenses" of the "Freedom Rides."

2. A Board majority refused to set aside an election in a companion case to *Sewell*, which also involved racial propaganda. *Allen-Morrison Sign Co.*, 138 N.L.R.B. No. 11, 50 L.R.R.M. 1535 (Aug. 9, 1962). In that case the employer used two propaganda devices. The first was a letter mailed to all employees, pointing out that the AFL-CIO, which included the petitioner union, was trying to promote integration, and had given \$75,000 from its treasury to the NAACP. The second was a clipping from *Militant Truth* (see note 1 *supra*), also sent to all employees. This clipping dealt with allegations that the national

The role of the NLRB in representation elections is more than that of an industrial abacus. The Board determines whether the uninhibited wishes of the employees have been recorded. It has considered the problem of employee freedom of choice from its earliest deliberations,³ and has set aside elections when it believed the integrity of its balloting was violated.⁴ The Supreme Court has interpreted broadly the Board's function in the conduct of elections.⁵ The Board has said it tries to establish a "laboratory" in which the free choice of employees could most accurately be determined. This "laboratory conditions" test was announced in *General Shoe Corp.*⁶ in 1948, probably the Board's most cited case standard on the setting aside of elections.⁷ But it is interesting

office of the union had suspended local officials in Front Royal, Virginia, nearby the election site in *Allen-Morrison*, for buying bonds to help finance a segregated school.

The decision to set aside the election in *Sewell* was 4-0. Member Rodgers did not participate. The decision upholding the election in *Allen-Morrison* was 4-1. In the latter case the Board majority said it was "applying the principles" of *Sewell*. It pointed out that in *Allen-Morrison* the employer's letter was "temperate" and "advised the employees as to certain facts," and that the "excerpt from *Militant Truth* concerned action taken by the Union in this case in a nearby city." It concluded that it was "not able to say that the Employer . . . resorted to inflammatory propaganda on matters in no way related" to the election. Member Brown dissented in *Allen-Morrison* because he believed "application of the criteria enunciated in the *Sewell* case requires the conclusion that in the circumstances of this case the Employer exceeded the limits of permissible campaigning."

3. See, e.g., *Interlake Iron Corp.*, 6 N.L.R.B. 780 (1938) ("objectionable" conduct "not . . . conducive to maintaining a proper decorum" but the Board felt such conduct "will not occur again" and did not upset the election).

4. An often-cited case from the earlier years is *Continental Oil Co.*, 58 N.L.R.B. 169 (1944), which articulated the standard this way: "Elements, regardless of their source or of their truth or falsity, which, in the experienced judgment of the Board, make impossible an impartial test, are grounds for the invalidation of an election." *Id.* at 172 n.2. Cf. *Curtiss-Wright Corp.*, 43 N.L.R.B. 795 (1942), for a refusal to set aside an election, in a fact pattern with particularly interesting public policy implications.

5. *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946); *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206 (1940). See also *NLRB v. Falk Corp.*, 308 U.S. 453 (1940).

6. 77 N.L.R.B. 124 (1948). The Board said that it was its "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 these conditions; it is also our duty to determine whether they have been fulfilled." *Id.* at 127.

7. *General Shoe* was also interesting because the Board noted that the criteria for setting aside elections were not identical with those for finding unfair labor practices. This issue was further developed in *Metropolitan Life Ins. Co.*, 90 N.L.R.B. 935 (1950), in which the majority emphasized that section 8(c) of the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 158(c) (1958), which provides that the expression of any views shall not "constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit," applied only to complaint cases and not to representation cases. This rule was rendered doubtful in a series of cases in the 1950's: *Lux Clock Mfg. Co.*, 113 N.L.R.B. 1194 (1955); *L. G. Everist, Inc.*, 112 N.L.R.B. 810 (1955); *A. S. Abell Co.*, 107 N.L.R.B. 362 (1953); *National Furniture Mfg. Co.*, 106 N.L.R.B. 1300 (1953). See discussion of these cases in 18 GA. B.J. 219 (1955). An amendment to the Taft-Hartley Act was introduced in Congress in 1954, providing that the expression of any view without threat of reprisal or promise of benefit should not be the basis for setting aside an election; however, the bill of which it was a part, S. 2650, 83d Cong., 2d Sess. (1954), was recommitted on May 7, 1954. 100 CONG. REC. 6202-03 (1954). See comments on this provision in *Hearings Before the Senate Committee on Labor and Public Welfare on Taft-Hartley Act Revisions*, 83d Cong., 1st Sess., Vol. 3, at 2143 (George

for the purposes of this note that a year earlier the Board set aside an election in which a local citizens' committee made several threats and innuendoes which included remarks with a racial tinge.⁸

Board decisions which set aside elections over the past decade present a picture of judicial empiricism, straining to reduce to a formula a delicate area concerning employee reactions which is knotty with specific fact situations. The Board has built up semantic formulas over the years, but the underlying patterns can be discerned, if at all, from the facts of each case, not to mention the labor jurisprudence of individual Board members. The Board's decision setting aside an election in *United Aircraft Corp.*⁹ represents both the synthesis and germination of a standard. The Board stressed that although "exaggerations, inaccuracies, partial truths, name-calling, and falsehoods" might be "excused" though not "condoned," it would set aside elections when the propaganda was "'so misleading' as to prevent the exercise of a free choice."¹⁰ The Board also said that when employees were deprived of their "ability to recognize propaganda for *what it is*" they became "helpless to exercise good sense in appraising it."¹¹ Since *United Aircraft*, the Board has set aside elections in situations when a union issued handbills containing untruths about the wages being paid under a nonexistent contract;¹² when an

J. Bott, NLRB General Counsel); Vol. 4, at 2793 (Secretary Mitchell); Vol. 4, at 3092-93 (Arthur Goldberg, then CIO General Counsel).

The issue of whether section 8(c) applies in representation cases arose again, implicitly, in a case involving a racial appeal, *Westinghouse Elec. Corp.*, 119 N.L.R.B. 117 (1957), in which Board Member Leedom, concurring, said that a threat or promise would be clear grounds for setting aside an election—and cited section 8(c)! [In an unfair labor practices case decided the same year, the Board adopted the findings, conclusions and recommendations of a trial examiner, who in dismissing unfair labor practice charges, noted that "as the Board held in *Metropolitan Life Ins. Co.* . . . and in similar cases, it is not limited by the provisions of Section 8(c) in determining whether or not a statement is of such nature as to make the free selection of a bargaining representative improbable." *Hicks-Hayward Co.*, 118 N.L.R.B. 695, 697 (1957).]

Because of the holding in *Sewell*, and the apparent confusion on the alleged carryover of section 8(c) to representation cases, the question arises in reversed fashion: Would the propaganda used in *Sewell* necessarily be grounds for an unfair labor practice charge? *Compare* *Bibb Mfg. Co.*, 82 N.L.R.B. 338 (1949), *with* *Happ Bros. Co.*, 90 N.L.R.B. 1513 (1950), *and* *Empire Mfg. Corp.*, 120 N.L.R.B. 1300 (1958).

8. P. D. Gwaltney, Jr., & Co., 74 N.L.R.B. 371 (1947).

9. 103 N.L.R.B. 102 (1953). In this case the United Auto Workers, which won the contested election, gave employees copies of a telegram purporting to come from Al Hayes, Machinists' Union president, which apologized for "smearing" the UAW. In setting aside the election, the Board said that "the UAW by its deliberate deception as to the source of the 'telegram' so blinded the employees to the significance of its content that they could neither recognize it as a fake nor evaluate it as propaganda." See also the Board's decision in *Timken-Detroit Axle Co.*, 98 N.L.R.B. 790 (1952), for a variation on this theme.

10. *United Aircraft Corp.*, *supra* note 9, at 104, citing *Kearney & Trecker Corp.*, 96 N.L.R.B. 1214 (1951), and *Chicago Mill & Lumber Co.*, 64 N.L.R.B. 349 (1945).

11. *United Aircraft Corp.*, 103 N.L.R.B. 102, 105 n.9 (1953).

12. *Gummed Prod. Co.*, 112 N.L.R.B. 1092 (1955). *Cf.* *F. H. Snow Canning Co.*, 119 N.L.R.B. 714, 717-18 (1957), distinguishing *Gummed Prod.* on the basis that the authors of the charge were not people particularly likely to have first hand knowledge of the subject, and that the employees were "free to weigh the contents" of the propaganda against a public repudiation by the petitioner union.

employer announced a new vacation plan a week before the election and persisted in publishing inaccurate material on union payroll deductions;¹³ and when propaganda originated in the community reasonably conveyed the view to employees that the plant would shut down if the union won.¹⁴ The Board recently has emphasized a severe view of what might be termed "prophecy threats"—employer "predictions" which "generate a fear of economic loss,"¹⁵ as well as misrepresentations combined with similar innuendoes.¹⁶

A parallel thread in Board history roughly defines the legitimate boundaries of propaganda by emphasizing a laissez-faire role for the Board.¹⁷ The case of *Stewart-Warner Corp.*¹⁸ in 1953 synthesized the semantic formula of what is permissible by stressing that the Board did not police or censor election propaganda, and that it would not upset an election when the employees "knew and could evaluate the source" of propaganda and the objecting party had a chance to correct inaccuracies.¹⁹ A year later, the Board upheld an election in which the union complained of such conduct as store managers giving out confidential information about a wage increase.²⁰ The majority of a bitterly divided Board said the Board must establish "ideal conditions insofar as

13. *Bata Shoe Co.*, 116 N.L.R.B. 1239 (1956). With respect to enticement, see also *Coca-Cola Bottling Co.*, 132 N.L.R.B. 481 (1961) (payments to employees with request to buy beer for their cohorts and persuade them to vote against the union). With respect to inaccurate propaganda, compare *Avon Prod., Inc.*, 116 N.L.R.B. 1729, decided the same year as *Bata*, in which an employer's statement failed to mention a five-cent increase won by the union at another plant. The Board said the employer's statement was "essentially correct" and that the omission of the five-cent increase was not such "as to influence the employees improperly or to prevent their exercise of a free choice."

14. For instance, a local paper's editorial was headed, "If the Union Comes—Lees Goes." *James Lees & Sons Co.*, 130 N.L.R.B. 290, 292 (1961), decided by a 3-2 vote. See also *Lake Catherine Footwear*, 133 N.L.R.B. No. 74, 48 L.R.R.M. 1683 (1961) (employer plus propaganda).

15. *Storkline Corp.*, 135 N.L.R.B. No. 118, 49 L.R.R.M. 1666 (1962) ("I predict" a loss of repeat orders). See also *Myrna Mills*, 133 N.L.R.B. No. 86, 48 L.R.R.M. 1707 (1961) (question and answer in employer's letter to employees: Question: "Will the plant close down if the Union gets in?" Answer: "We hope not, but our guess is the Union could cause enough trouble to force the plant down like unions have done at so many places."). Similarly, see *Somismo, Inc.*, 133 N.L.R.B. No. 131, 49 L.R.R.M. 1030 (1961) (employer's speech: "There is no doubt in my mind there will be a strike [if the Union is voted in] . . . whether we go out of business or not I am not saying right now. Use your own judgment.").

16. *Haynes Stellite Co.*, 136 N.L.R.B. No. 3, 49 L.R.R.M. 1711 (1962). This decision was based, *inter alia*, on the Board's finding that the employer had materially misrepresented that "some" customers would seek other sources of supply if the plant was unionized, whereas only one customer had so informed him.

17. Two much-cited early examples are *Corn Prod. Ref. Co.*, 58 N.L.R.B. 1441 (1944), and *Maywood Hosiery Mills, Inc.*, 64 N.L.R.B. 146 (1945). In these cases the Board was confronted with propaganda which it granted to be "offensive and unethical" (58 N.L.R.B. at 1443), or "objectionable" (64 N.L.R.B. at 151), but rested its faith in the ability of employees to weigh the material.

18. 102 N.L.R.B. 1153 (1953). The employer in this case misrepresented that if employees elected the petitioner they would lose a four-cent increase because of a Wage Stabilization Board ruling.

19. *Id.* at 1158.

20. *Liberal Market, Inc.*, 108 N.L.R.B. 1481 (1954).

possible" but that it must recognize that its elections "do not occur in a laboratory where controlled or artificial conditions may be established."²¹ In succeeding cases, the Board refused to set aside elections in situations when employers misrepresented wage rates won by the union at a competitor's plant;²² threatened to bargain "from scratch";²³ and predicted that a certain group of employees would lose work if the union won.²⁴

It is against the background of these decisions on the validity of elections generally that we may now refer to Board actions when the racial issue is raised. The Board condemned both employers and unions for remarks appealing to race prejudice in a series of cases in 1957 and 1958, but it refused to set aside the elections in those cases.²⁵ The Board did set aside an election in which a racial issue figured at least implicitly, but its identification of that issue as a factor in its decision was at best ambiguous.²⁶ Another election was upset when the Board found unfair

21. *Id.* at 1482. Compare the quotation from *General Shoe Corp.*, note 6 *supra*.

22. *Kennametal, Inc.*, 121 N.L.R.B. 410 (1958), distinguishing *Gummed Prod. Co.*, 112 N.L.R.B. 1092 (1955), on the basis that in *Kennametal*, the wage rates were not the type of information which the employees "believed was authoritatively known to the employer" or about which he would likely have "first-hand knowledge." See also *DeVilbiss Co. & Richard Glenn Platt*, 115 N.L.R.B. 1164 (1956) (half-truths on union dues and misrepresentation of union's position on certain matters; election upheld). *Cf.* *Bata Shoe Co.*, 116 N.L.R.B. 1239 (1956), and *Avon Prod., Inc.*, 116 N.L.R.B. 1729 (1956), discussed at note 13 *supra*.

23. *Universal Producing Co.*, 123 N.L.R.B. 548 (1959).

24. *Weil-McLain Co.*, 130 N.L.R.B. 19 (1961). See also *Motec Indus., Inc.*, 136 N.L.R.B. No. 74, 49 L.R.R.M. 1828 (1962). The Board there upheld an election in which the employer sent a letter to employees saying that a vote for one of two unions would be "detrimental to our mutual best interests," because the government was "wary" in selecting contractors and "the wrong vote could jeopardize our ability to get as much of this work as we need." It should be noted that the employer's letter gave a "personal guarantee" of job safety so far as taking a position in the election was concerned, and that the union he attacked was able to reply. The Board said that "in the circumstances, the employees were capable of evaluating the employer's letter."

25. *Paula Shoe Co.*, 121 N.L.R.B. 673 (1958) ("if you want to avoid that the Jew Sandler continue to mistreat you, vote for UTM"); *Chock Full O' Nuts*, 120 N.L.R.B. 1296 (1958) (company vice-president Jackie Robinson's remarks to Negro employees that he "was the reason for the union" and that white employees were jealous of his position); *Sharnay Hosiery Mills, Inc.*, 120 N.L.R.B. 750 (1958) (letter similar in content to that in *Allen-Morrison*, discussed note 2 *supra*; see especially the concurring opinion of Members Leedom and Bean); *Westinghouse Elec. Corp.*, 119 N.L.R.B. 117 (1957) (decided principally on procedural grounds; see especially Board Member Leedom's concurring opinion: "to draw the issue along these [racial] lines does not effectuate the policies of the Act. The implications are far greater . . . than the reaches of the Act, for they bespeak an assault upon the spirit of our Constitution." (Emphasis added.)). See also *Mead-Atlanta Paper Co.*, 120 N.L.R.B. 832 (1958). *Cf.* *P. D. Gwaltney, Jr. & Co.*, 74 N.L.R.B. 371 (1947).

26. *Heintz Division, Kelsey-Hayes Co.*, 126 N.L.R.B. 151 (1960). The intervenor union, which opposed the petitioning union in the election, picked out eight men, five of whom were Negroes, to distribute handbills asking employees to vote for the petitioner, without any indication that it was the intervenor which was employing the men. The election was set aside, but the Board does not speak directly of a racial issue. It simply mentions fraud, trickery and depriving employees of "their ability to recognize propaganda for what it is," and holds that the failure of parties to identify themselves as the sponsor of propaganda is grounds for setting aside an election. See the critique of this case by

labor practices in employer interrogations which included a remark with racial overtones.²⁷ Further, the Board has found racial remarks to be unfair labor practices when there was no representation issue per se involved.²⁸

The instant case represents the first time the Board has set aside an election explicitly because of the use of racial propaganda. The decision rests partly on the premise that the Board "not only conducts elections, but also oversees the propaganda activities of the participants . . . to insure . . . a reasoned, untrammelled choice."²⁹ The Board conceded that "some appeal to prejudice of one kind or another" is inevitable in any election.³⁰ But it postulated as "datum" that "prejudice based on color is a powerful emotional force," and that it is "indisputable that a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty."³¹ Having set forth these premises, the Board constructed a standard. Certain "moderate and truthful" remarks which cater to race prejudice must be tolerated if they concern matters about which employees are entitled to know.³² The Board will allow these appeals if they are truthful and do not seek deliberately to inflame racial feelings,³³ but will set aside an election when the appeals are unrelated to the issues in the election or the union's activities, and are solely inflammatory in purpose.³⁴ Indeed, the Board placed the burden on the party using the "racial message" to establish that it is

Prof. Michael I. Sovern in his magisterial article, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 618 (1962). It is noted that less than twenty of the 1,377 employees eligible to vote in the election were Negroes. *Ibid.*

27. Model Mill Co., 103 N.L.R.B. 1527 (1953), in which the employer told a colored employee, *inter alia*, that he had heard that "in some plants after a union has been voted in, the colored employees had been laid off." Compare the trial examiner's refusal to find an unfair labor practice in the action of the company president who, during a speech, told a Negro employee to sit in his chair behind his desk and asked, "How would you like someone to come into your home and tell you how to run it?" *Id.* at 1534 (facts); *id.* at 1538 (finding).

28. Petroleum Carrier Corp., 126 N.L.R.B. 1031 (1960) (assistant manager said that if the union came in he would hire a "nigger, cajun, wop or whatnot"); Empire Mfg. Corp., 120 N.L.R.B. 1300 (1958) (supervisor said that if union came in there would be "hiring niggers"); Bibb Mfg. Co., 82 N.L.R.B. 338 (1949) (distribution of paper which said "the Communist CIO" was "busy in the southern textile mills with their chief plan and purpose of 'breaking down' the color line, and even to the extent of urging intermarriage between the Negroes and the whites . . ."). See also Granwood Furniture Co., 129 N.L.R.B. 1465 (1961) (foreman told two Negro employees about the possibility of their being replaced with whites if the union won). *But cf.* Haßp Bros. Co., 90 N.L.R.B. 1513 (1950) (forelady told employees that if they "got tied up with the C.I.O. and John L. Lewis, they'd work side-by-side with Negroes"; Board, though deprecating such remarks, found no coercion).

29. Sewell Mfg. Co., 138 N.L.R.B. No. 12, p. 5 (1962).

30. *Id.* at 6.

31. *Id.* at 7.

32. *Id.* at 8. The Board cites Sharnay Hosiery Mills, 120 N.L.R.B. 750 (1958), and Allen-Morrison Sign Co., 138 N.L.R.B. No. 11 (1962), as examples of moderate statements.

33. Sewell Mfg. Co., 138 N.L.R.B. No. 12, p. 8 (1962).

34. *Id.* at 7.

truthful and germane and said it would resolve doubts against that party.³⁵ Applying this standard to the instant case, the Board concluded that the employer "calculatedly" mounted an inflammatory campaign so the employees "would reject the Petitioner out of hand on racial grounds alone." It drew this conclusion particularly from the propaganda photographs of mixed dancing and the news story on the Mississippi election of 1957 which was appended to one of the photographs.³⁶

This singular decision contains elements of high judicial drama, combining two of the greatest areas of tension in American life. It is significant for labor relations because of its emphasis on a trenchant view of reality in the industrial process. This realism has appeared increasingly of late in the Board's consideration of the impact of employer "predictions" and propaganda in both unfair labor practices cases³⁷ and representation cases.³⁸ In general, there is an indication that the Board is reworking its views on the balance between employer "free speech" and employee "freedom of choice."³⁹

Quite as meaningful is the relationship of this decision to the stream of American thought which emphasizes a positive role for government when racial issues create friction in society. The decision reflects the climate of opinion of recent Supreme Court doctrine on race relations, exemplified by the school segregation cases. *Sewell Mfg. Co.* may have other judicial ancestors,⁴⁰ but its direct progenitor is *Brown v. Board of Educ.*⁴¹ Particularly interesting in this reference is the Board's declaration that it is "datum" that color prejudice is a "powerful emotional force" and "indisputable" that "a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty."⁴² Where the Supreme Court in *Brown* supported the contention that "separate educational facilities are inherently unequal" with authority from the modern social sciences,⁴³ the appeal in *Sewell* seems to be a kind of consensus of common sense.⁴⁴ These differences in method aside, how-

35. *Id.* at 8.

36. *Id.* at 9; see note 1 *supra* for a fuller description of this material.

37. See, e.g., *Wilder Finishing Co.*, 138 N.L.R.B. No. 113 (1962); *Alamo Linen Serv.*, 136 N.L.R.B. No. 117 (1962).

38. See, e.g., *The Trane Co.*, 137 N.L.R.B. No. 165 (1962).

39. For one Board member's ideas in this area, see Gerald A. Brown, "Freedom of Choice and the National Labor Policy," speech before the Labor Law Section, State Bar of Texas (July 5, 1962), excerpted 50 L.R.R.M. 249. The writer is also indebted to Board Member Brown for some stimulating thoughts expressed on this general subject in a personal conversation, week of August 13, 1962.

40. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952), in which the Supreme Court affirmed a conviction under an Illinois statute which made it illegal to publish certain kinds of defamatory racial literature.

41. 347 U.S. 483 (1954).

42. *Sewell Mfg. Co.*, 138 N.L.R.B. No. 12, p. 7 (1962).

43. 347 U.S. at 494-95 n.11 (1954).

44. *Cf. Sweatt v. Painter*, 339 U.S. 629, 634 (1950) ("those qualities which are incapable of objective measurement but which make for greatness in a law school").

ever, the underlying pattern is that of an emergent and general public policy on racial matters,⁴⁵ emphasizing a discerning view of educational reality in the one case and of industrial reality in the other.⁴⁶

The decision does present a yeasty group of problems, including its implications for thought control. What is germane and reasonable to one man may be irrelevant and intemperate to another.⁴⁷ Further, the Board's realistic view of industrial elections may lose some value because of its rather exclusive emphasis on the reasoning process. It is axiomatic that reason should play a paramount role in any election, but does the Board's focus on reason deny the connotations of its own prior language about determining the "uninhibited desires" of employees?⁴⁸ It may also be asked whether the requirement that electoral appeals be "truthful" is *sui generis* to racial propaganda, a reversal of the Board's previous language saying it will "excuse" but not "condone" falsehoods,⁴⁹ or simply a single-case definition of the line where propaganda must stop.

Indeed, the boundary question of what is permissible will demand future clarification. Assume a situation which combines certain elements of the instant case and of its companion case: An employer mails a picture of a union's international president dancing with a Negro lady to employees whose votes are sought by *that* union's local. The picture, innocuously captioned, is accompanied by a "reasoned" and truthful presentation of the views of the union, which favors the immediate "elimination of racial segregation from every phase of American life."⁵⁰ Such a picture may well be called inflammatory in certain social contexts. But in *Sewell's* companion case,⁵¹ a Board majority tolerated printed material of the kind hypothesized, finding it sufficiently germane

45. See Board Member Brown's speech, *supra* note 39, and *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942), cited therein, on the Board's relationship to the "entire scope of Congressional purpose."

46. But if the Board is attempting to cut through to the realities, it is not true, as Prof. Sovern suggests, that "the nature of these utterances . . . probably cannot be undone by any remedies at our disposal," and that "the only truly effective way to prevent companies from capitalizing on union fair employment policies is to require them to adhere to the same sort of policies themselves"? Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 *COLUM. L. REV.* 563, 632 (1962). A partial answer to this question is suggested by the idea that decisions such as the one in the instant case will have a prophylactic effect for the future.

47. For instance, note that Member Brown dissented in *Allen-Morrison Sign Co.*, 138 *N.L.R.B.* No. 11 (1962) (see quotation note 2 *supra*). See also *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 230 (1949) on another subject: "We cannot equate a company-dominated North Carolina mill town with the vast metropolitan centers . . ."

48. See the language in *General Shoe Corp.*, 77 *N.L.R.B.* 124 (1948), quoted note 6 *supra*.

49. See the language in *United Aircraft Corp.*, 103 *N.L.R.B.* 102 (1953), quoted in text accompanying note 10 *supra*.

50. This phrase, quoted from an AFL-CIO document, was used in one of the employer's letters in *Allen-Morrison Sign Co.*, 138 *N.L.R.B.* No. 11 (Aug. 9, 1962), discussed note 2 *supra*.

51. *Allen-Morrison Sign Co.*, *supra* note 50.

to the voters' choice. With the addition of the kind of picture described above to the mailing, will relevance or flammability weigh heavier in the Board's decision? It is true that a vital legal system demands judicial consideration of many subtleties of human experience, yet the nature of the hidden springs of political conduct in cases like these may strain the capacity of any judicial or quasi-judicial body.

The writer believes that despite the problems this case raises, the Board has sounded a healthy note for national policy. It has set a standard, rough-hewn though it may be.

MARSHALL S. SHAPO

WORKMEN'S COMPENSATION—UNUSUAL EXERTION TEST FOR HEART CASES

The claimant, while engaged in his usual employment activities of lifting, carrying and stacking cases of whiskey on a truck, suffered a coronary occlusion. The deputy commissioner's order, which was affirmed on appeal to the Florida Industrial Commission, granted compensation on the ground that the claimant's injury was causally contributed to by his employment. On certiorari to the Florida Supreme Court, *held*, reversed: a heart attack suffered by an employee while at his usual work is not a compensable injury under the Florida Workmen's Compensation Law. In heart cases, when the duties incident to the employment precipitate a disabling heart attack, the injury is compensable only if the employee was at the time subject to unusual strain or overexertion not routine to the type of work he was accustomed to performing. *Victor Wine & Liquor, Inc. v. Beasley*, 141 So.2d 581 (Fla. 1962).

Under the Florida Workmen's Compensation Law, an injury is compensable if it occurs by accident and arises out of and in the course of the employment.¹ As early as 1903, judicial construction was given to the term "accident."² The definition provided was "an unlooked-for mishap or an untoward event which is not expected or designed."³ This interpretation of the English Workmen's Compensation Law, upon which the Florida statute is based,⁴ has been favorably considered since its rendition in both England and the United States.⁵

The Florida Supreme Court saw fit to further define the term by requiring the injury to *follow* an unexpected or unusual event.⁶ This

1. FLA. STAT. § 440.02(6) (1961).

2. *Fenton v. Thorley & Co.*, [1903] A.C. 443.

3. *Id.* at 448.

4. Brown, *Preface* to FLORIDA INDUSTRIAL COMM'N, THE WORKMEN'S COMPENSATION LAW at v (1961).

5. *Clover, Clayton & Co. v. Hughes*, [1910] A.C. 242; 1 LARSON, WORKMEN'S COMPENSATION LAW § 37.00 (1952).

6. *McNeill v. Thompson*, 53 So.2d 868 (Fla. 1951); *LeViness v. Mauer*, 53 So.2d 113