III. Labor Law

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A. Misrepresentations in Labor Representation Elections—
Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968).

Gallenkamp Stores Co. v. NLRB1 for the first time presented to
the Ninth Circuit the question of the validity of a labor representation
election marred by misrepresentations in campaign literature. The case
developed from a 1964 representation election in which the Retail
Clerks Union, AFL-CIO, sought to become the collective bargaining
representative of K-Mart and its licensees, which included Gallenkamp.
The election was won by the union, 38 to 37, but was challenged by
K-Mart in proceedings before the National Labor Relations Board.
The dispute stemmed from a leaflet distributed one or two days prior
to the election which compared current wages paid to petitioner's em-
ployees with higher wages paid to employees performing similar work
in stores under union contract. The union, however, failed to disclose
in its leaflet that the higher rates represented the highest of four wage
rates possible under the union contract and that such wages could be
received only after one year's employment. These omissions were im-
portant because many of the petitioner's employees had been employed
for less than one year. K-Mart, which was unable to refute these last
minute statements, maintained these misrepresentations were so sub-
stantial that they should vitiate the election.

The Board rejected K-Mart's objections and certified the union as
K-Mart's collective bargaining representative. K-Mart thereafter re-
fused to bargain with the union, which responded by instigating a sec-
ond proceeding before the Board2 asking that a cease and desist order
be issued against K-Mart to eliminate conduct that the union contended
constituted an unfair labor practice. The Board complied with the
union's request by ordering K-Mart to cease and desist from its re-
fusal to bargain. K-Mart then petitioned the Ninth Circuit to set aside
the Board's order and by this indirect and circuitous method brought
in issue the validity of the representation election.

The Evolution of Current Board Standards

In the course of litigation, the NLRB has gradually developed

1. Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968). This case
   is a consolidation of three cases: Gallenkamp Stores Co. v. NLRB, K-Mart v. NLRB,
   and Hollywood Hat Co. v. NLRB.

2. This second proceeding is reported in 162 N.L.R.B. 498 (1966).
several principles to determine whether misrepresentations must nullify a representation election. The Board has attempted to implement the basic goals of the National Labor Relations Act: to encourage collective bargaining, and to guarantee employees the right to organize and select representatives of their own choosing. This second goal guided the Board in the early development of its policy in regulating representation elections. In the landmark case of General Shoe Corp., in which the Board crystallized the policy guidelines that have continued to be espoused (if not actually implemented) down to the present day, the Board said: "Our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative." In General Shoe, the Board established the rule that representation elections were to be conducted as experiments under laboratory conditions. The Board assumed responsibility for establishing such conditions and for determining whether they had been met. If they were not met, the experiment was to be conducted again.

Eventually, the ideal of an election conducted under laboratory conditions became "an objective that no seasoned observer consider[ed] realistic." Under the pressure of a mounting workload, the Board developed as a goal the speedy resolution of election results. Consequently, by 1958 the Board had softened the requirement of pure laboratory conditions and had taken the position that it was not meant to police election proceedings. It resolved to leave the distinguishing of campaign puffing from fact to the good sense of the employees.

The current policy on misrepresentations affecting the validity of representation elections, promulgated in the leading case of Hollywood Ceramics Co., reflects the Board's recognition of the sophistication of the employee. In that case, the Board held that "laboratory conditions" were not necessarily impaired when a party "overstates its own virtues and the vices of the other" party. In noting that complete honesty, either by the union or the company, was not anticipated by employees,

4. 77 N.L.R.B. 124 (1948).
5. Id. at 126, quoting P. D. Gwaltney, 74 N.L.R.B. 371, 373 (1947).
6. 77 N.L.R.B. at 127.
7. Id.
8. Bok, The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 45 (1964) [hereinafter cited as Bok].
10. See Bok, supra note 8, at 63. See also 402 F.2d at 536 (dissenting opinion).
13. Id. at 224.
the Board cautioned against nullifying elections conducted under its own supervision and observed that setting aside elections would "upset the plant routine and prevent stable labor-management relations."\footnote{Id. at 223.} While adhering to its policy that an election must afford employees an "untrammeled choice," the Board balanced this right with "the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering."\footnote{Id. at 224.} The Board then restated the criteria to be used in determining misrepresentation cases:

We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentations as would lead us to set the election aside. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons.\footnote{Id.}

These guidelines were qualified, however, by a caveat that is important to an evaluation of the \textit{Gallenkamp} decision:

But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example . . . the Board may find that the employees possessed independent knowledge with which to evaluate the statements.\footnote{Id.}

Scope of Judicial Review of Board Decisions

Unlike the wide discretion granted to the NLRB, the judicial role in controlling representation elections was meant to be limited. Congress established procedures for review of Board decisions by courts of appeals only on issues of unfair labor practices.\footnote{29 U.S.C. § 158 (1964).} Therefore, unless election behavior constitutes an unfair labor practice as defined in the National Labor Relations Act,\footnote{29 U.S.C. § 160(e)-(f) (1964).} the Board's findings determining the validity of an election can not be directly appealed to the courts.\footnote{See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 357 (1965) [hereinafter cited as JAFFE].} To secure judicial review of an adverse Board ruling in a representation
proceeding, a party must first commit an unfair labor practice by defying the Board's decision. This difficult, circuitous path to the courts reflects the congressional intent to place the control of representation elections in the hands of the Board.

Within this unfair labor practices framework, the courts of appeals in reviewing Board decisions have been additionally limited by the substantial evidence rule to determining whether the Board's findings "with respect to questions of fact [were] supported by substantial evidence on the record considered as a whole . . . ." The prevailing interpretation of the substantial evidence test is contained in the Supreme Court decision, *Universal Camera Corp. v. NLRB*:

To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice, had the matter been before it de novo. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

The Supreme Court has further recognized that courts, in reviewing Board decisions, should take cognizance of factors which are instrumental in the formulation of Board policy. After stating that the Board has broad discretion to effectuate the policies of the National Labor Relations Act, the Court stated:

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21. 29 U.S.C. § 158 (1964). The unfair labor practice complained of in *Gallenkamp* was refusal of the company to bargain with the certified union. The unfair labor practice proceeding before the Board is found in K-Mart, 162 N.L.R.B. 498 (1966).

22. *See Jaffe 357; Goldberg, District Court Review of NLRB Representation Proceedings, 42 Ind. L.J. 455, 460-65 (1967).*

23. 29 U.S.C. § 160(e)-(f) (1964). In *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 147 (1937), the Supreme Court developed the substantial evidence rule in an interpretation of the Wagner Act, 49 Stat. 449 (1935). Congress retained this limiting rule in the Taft-Hartley Act, but modified it by adding the requirement that the record be considered as a whole in order to stop the practice by some courts of examining only the evidence favorable to the Board. The purpose and history of this modification is examined in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).


25. *Id.* at 488.
Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.26

Despite these apparently clear guidelines, the courts of appeals have approached review of Board election misconduct decisions with differing attitudes about the nature and scope of that review. Some courts have probed deeply into Board rulings while others have attempted to ascertain only whether the Board's decision is reasonable in light of the record. The First Circuit, for example, in a decision extremely critical of Board policy, chastized the Board for the bases it used to develop policy.27 At the other extreme, a Seventh Circuit decision avoided extensive investigation of Board findings out of respect for what the court felt was the Board's wide discretion.28 Earlier Ninth Circuit decisions appear to side with the latter view that "[t]he control of elections resides in the Board alone."29 Although the issue of campaign misconduct has reached the Ninth Circuit before,30 Gallenkamp represents the first time in which the misconduct complained of concerned misrepresentations in an election campaign.31

To understand the implications of the Gallenkamp decision, it is necessary to examine it in relation to the guidelines developed by the Board in Hollywood Ceramics,32 the Ninth Circuit's respect for the factors responsible for Board policy, and the nature and scope of the court's review.

The Ninth Circuit and Hollywood Ceramics

In Gallenkamp, the NLRB followed the hands-off policy of Hollywood Ceramics. Conceding that there were misrepresentations33 (although it made no finding as to their substantiality), the Board apparently relied on the caveat in Hollywood Ceramics that "even where a misrepresentation is shown to have been substantial,"34 the election may

26. NLRB v. Gullette Gin Co., 340 U.S. 361, 363 (1951), quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); see Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 681 n.1 (1944), where the Supreme Court said the judgment of the Board is entitled to great weight on questions of law. In Gotten Marine Co. v. Douds, 137 F. Supp. 531, 533 (S.D.N.Y. (1956)), the court stated that an interpretation of the National Labor Relations Act by the Board is entitled to great weight.
28. Olson Rug Co. v. NLRB, 260 F.2d 255 (7th Cir. 1958).
29. Foreman & Clark, Inc. v. NLRB, 215 F.2d 396, 409 (9th Cir. 1954); accord, International Tel. & Tel. Corp. v. NLRB, 294 F.2d 393 (9th Cir. 1961).
30. E.g., Foreman & Clark, Inc. v. NLRB, 215 F.2d 396 (9th Cir. 1954).
31. 402 F.2d at 534.
32. See text accompanying notes 12-17 supra.
33. 402 F.2d at 533.
34. 140 N.L.R.B. at 224.
still be valid if the Board determines that there are circumstances which mitigate the adverse impact of the misrepresentations. The example of such circumstances hypothesized by the Board in *Hollywood Ceramics* paralleled the facts later found by the Board in *Gallenkamp*: "that the employees possessed independent knowledge with which to evaluate the statements." The Board found that the employees could evaluate the misrepresentations contained in the union leaflet by comparing the misstatements with a truthful handbill, mailed to the employees 10 days earlier, which presented more complete data on the subject matter of the disputed leaflet. The Board also found that the employees could have ascertained the truth about wages paid under union contract by inquiring of employees at unionized stores.

The Ninth Circuit's refusal to enforce the Board's order avoided a determination of whether or not the Board's finding that the employees had adequate sources of information was supported by substantial evidence. Instead, it based its decision on an independent determination of the materiality of the misrepresentation, the timing of the misrepresentation, and the closeness of the election vote. The court emphasized that a misrepresentation concerning wages, which it classified as the "stuff of life for Unions and members," was of paramount importance. Furthermore, the distribution of the disputed leaflet on the eve of the election afforded the company no effective opportunity to reply to the misrepresentations contained in the circular. Finally, the court apparently felt that the likelihood of these circumstances effecting the outcome of the election was increased by the union's thin one-vote margin of victory.

Under the guidelines of *Hollywood Ceramics*, it is evident the Ninth Circuit's finding of a material misrepresentation could not justify a contrary conclusion to the decision of the Board unless the court also determined that there was not substantial evidence to support the Board's finding of an adequate opportunity on the part of the employees to investigate and compare the misrepresentations. Although

35. See text accompanying note 17 supra.
36. 140 N.L.R.B. at 224.
37. 402 F.2d at 533; Brief for Respondent at 54-56, Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968).
38. 402 F.2d at 534; Brief for Respondent at 54-56, Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968).
39. See text accompanying note 16 supra.
40. 402 F.2d at 534.
41. Id. at 535.
42. See 402 F.2d at 535. The court's emphasis on the closeness of the election vote does not conflict with Board policy. See, e.g., Higgins, Inc., 106 N.L.R.B. 845, 846-47 (1953). See Samoff, *supra* note 9, at 237 n.26, who states that, although the Board seldom declares the margin of victory to be a factor, the margin of victory is influential as a "latent element."
the Ninth Circuit noted that the Board had relied primarily on this finding to justify its certification of the election, the court never expressly considered its adequacy. The finding either was ignored entirely, or was considered, sub silentio, to be insufficiently supported. If the court did in fact decide the issue, but merely failed to mention it—a highly unlikely prospect—its decision, although misleading, would nevertheless be correct. On the other hand, if the court refused to consider the mitigating factors found by the Board as bearing on the decision, it would appear to be finding as a matter of law, that once an election is found to have been tainted by substantial misrepresentations, no independent source of information available to the voters will save that election. If this is the case, then the Ninth Circuit, ignoring the Supreme Court's admonition against "sliding unconsciously ... into the ... spacious domain of [Board] policy," is basing its decision on an improper application of law in disregarding the standards promulgated in Hollywood Ceramics. In any event, the court must be criticized for remaining silent on the issue, for when the courts of appeals deny enforcement of Board decisions, the substantial evidence rule demands that they refute all issues presented by the Board that could justify the Board's decision.

The court's failure to adhere to the policies of the Board is reflected throughout the Gallenkamp opinion. For example, instead of looking to the Hollywood Ceramics guidelines and seeking to understand the Board policy expressed therein, the court looked to comparable cases in other circuits for guidance. Furthermore, although the court did not refer to "laboratory conditions" in so many words, it appears to have been influenced by the policy basis of that theory in rejecting the permissive, hands-off view of Hollywood Ceramics in favor

43. 402 F.2d at 533; Brief for Respondent at 54-56, Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968).
44. NLRB v. Gullett Gin Co., 340 U.S. 361, 363 (1951), quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); see text accompanying note 26 supra.
45. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see text accompanying note 25 supra.
46. 402 F.2d at 534-35. The court especially relied on the Seventh Circuit's decision in Celanese Corp. v. NLRB, 291 F.2d 224 (7th Cir. 1961), instead of using the guidelines outlined in Hollywood Ceramics. In Celanese, the Seventh Circuit held that in order to set aside an election it must be shown that "(1) there has been a material misrepresentation of fact, (2) this misrepresentation comes from a party who had special knowledge or was in an authoritative position to know the true facts, and (3) no other party had sufficient opportunity to correct the misrepresentations before the election." Celanese Corp. v. NLRB, 291 F.2d 224, 226 (7th Cir. 1961), quoted in Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 534 (9th Cir. 1968).
47. See 402 F.2d at 533-35, where the court emphasized the goal of protecting the free choice of the employees. See text accompanying note 5 supra.
of the stricter General Shoe position originally espoused by the Board. The Board's present policy of shunning the role of policeman was mentioned but once, quickly followed by "however," and never mentioned again. Its policy of seeking the speedy resolution of election results, although mentioned in the dissent, was never explored by the majority of the court. All-in-all, the Gallenkamp decision evidences almost total disregard for the present policies that the NLRB has developed to guide its overseeing of representation elections.

**Court Scrutiny of Board Decisions**

Derek Bok, in a leading article on the regulation of representation elections, observed that "recently . . . courts of appeals have called upon the Board to scrutinize campaign propaganda with greater care." Viewed in isolation, Gallenkamp might appear to substantiate Bok's assertion as far as the Ninth Circuit is concerned. Evidence supporting a finding that the Ninth Circuit has joined this trend can be found in its reliance on Celanese Corp. of America v. NLRB, a leading case demanding closer Board scrutiny of campaign propaganda.

The Ninth Circuit's apparent alignment with the courts described by Bok, however, is quite probably illusory; Gallenkamp stands virtually alone against a substantial array of decisions and a majority of the Ninth Circuit judges. Indeed, Judge Ely's critical dissent in Gallenkamp appears to be more in line with past Ninth Circuit decisions. Ely criticized the majority for substituting its judgment for that of the Board and stated that the court should respect the expert determination of the Board, which "has a paramount interest in the preservation of the integrity of elections conducted under its own processes."

Prior Ninth Circuit support for Ely's position is exemplified by Foreman & Clark, Inc. v. NLRB, which upheld an NLRB decision voiding a representation election and represents the antithesis of the position taken by the Gallenkamp court. While Gallenkamp made

48. General Shoe Corp., 77 N.L.R.B. 124 (1948); see text accompanying notes 6-8 supra.
49. 402 F.2d at 533.
50. Id. at 536.
52. Bok, *supra* note 51, at 83.
53. 279 F.2d 204 (7th Cir. 1960), vacated per curiam and remanded, 365 U.S. 297 (1961), enforcement denied, 291 F.2d 224 (7th Cir.), cert. denied, 368 U.S. 925 (1961).
54. Bok, *supra* note 51, at 83.
55. 402 F.2d at 536.
56. 215 F.2d 396 (9th Cir. 1954).
passing reference to the substantial evidence rule, Foreman & Clark stated that the Board must be "clearly" erroneous before the court can intercede, and although Gallenkamp mentioned in passing the "discretion" of the Board, Foreman & Clark glorified the expertise of administrative agencies and stressed the "limited functions of review by the judiciary."

The position presented in Foreman & Clark was reaffirmed by the Ninth Circuit in International Telephone & Telegraph Corp. v. NLRB. This case enforced a Board decision to certify an election in which two employees, whose votes might have affected the outcome of the election, were inadvertently not afforded an opportunity to vote. The court noted that "[r]epeated appellate court litigation without allowing considerable discretion on the part of the NLRB thwarts" the policy of Congress to have the Board expedite the process of choosing representatives. The court properly implemented the substantial evidence test, as interpreted by Universal Camera Corp. v. NLRB, when it stated:

Hence, although we may think that the NLRB might have been better advised to order a new election, we do not believe there was an abuse of discretion in failing so to do. . . .

. . . Surely it would be vain for this court to hold that we are better equipt [sic] than the NLRB to determine whether the opportunity given employees to vote was "adequate" unless clear error was shown.

The cautious approach reflected in the International Telephone & Telegraph and Foreman & Clark cases can also be seen in the more recent cases of NLRB v. E-Z Davies Chevrolet, decided less than four months before Gallenkamp, and Sonoco Products Co. v. NLRB, decided just one day before Gallenkamp. Both cases, decided without dissent, upheld Board holdings on representation elections. In E-Z Davies, Judge Ely summarily disposed of arguments attacking the

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57. The court in Gallenkamp mentioned the substantial evidence test only once toward the end of the opinion in a statement which seems to represent more of an afterthought than a presentation of an important factor. See id. at 535.
58. Foreman & Clark, Inc. v. NLRB, 215 F.2d 396, 398 (9th Cir. 1954).
59. 402 F.2d at 533.
60. Foreman & Clark, Inc. v. NLRB, 215 F.2d 396, 405 (9th Cir. 1954).
61. 294 F.2d 393 (9th Cir. 1961).
62. International Tel. & Tel. Corp. v. NLRB, 294 F.2d 393, 395 (9th Cir. 1961).
64. 294 F.2d at 395; accord, NLRB v. J.R. Simplot Co., 322 F.2d 170 (9th Cir. 1963).
65. 395 F.2d 191 (9th Cir. 1968).
66. 399 F.2d 835 (9th Cir. 1968).
67. Sonoco Prods. Co. v. NLRB, 399 F.2d 835 (9th Cir. 1968), denied enforcement of the NLRB order on other grounds.
Board's finding of a valid election, and in *Sonoco*, the court noted the "broad discretion" of the Board in solving representation election disputes. The disposition of the seven different circuit judges appearing in the *E-Z Davies, Sonoco*, and *Gallenkamp* cases casts doubt on a conclusion that the two to one majority in *Gallenkamp* unalterably commits the Ninth Circuit to a policy of close scrutiny of election propaganda. When comparing the opinions of the Ninth Circuit judges, the majority in *Gallenkamp* becomes a minority in the circuit. When contrasting the decisions of the Ninth Circuit, *Gallenkamp* stands alone.

The intent of Congress to make the Board, not the courts, the overseer of representation elections demands a different result from that delivered in *Gallenkamp*. This intention, manifested in the circuitous path to court review, has been recognized by the Ninth Circuit in prior decisions. The substantial evidence rule, established to insure that decisions of the Board be given respect, was misused by the court when it reversed the holding of the Board without determining the validity of the findings which supported the Board's decision. The court not only ignored the factual basis of the Board's determination, it also failed to consider the Board's policy as outlined in *Hollywood Ceramics*, relying instead on selected decisions from other circuits.

In future representation election misconduct cases, the Ninth Circuit should look to Judge Ely's dissent and recognize *Gallenkamp* as an anomaly which deserves little, if any, weight as proper authority. A reevaluation of *Gallenkamp* in light of the intent of Congress and the rationale behind Board policy should guide the Ninth Circuit to decisions that will respect the Board's "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives."

*James T. Winkler*

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68. *Sonoco Prods. Co. v. NLRB*, 399 F.2d 835, 838 (9th Cir. 1968).
69. In addition to two circuit judges, District Judge Crocker also participated in the *Sonoco* decision. Judge Ely was the only judge to sit in more than one of the three cases, *Gallenkamp* and *E-Z Davies*. The other circuit judges appearing in the three cases were Pope, Duniway, Barnes, Jertberg, Hamley, and Carter. The last two represented the majority in *Gallenkamp*.
70. See text accompanying notes 18-22 supra.
71. See *International Tel. & Tel. v. NLRB*, 294 F.2d 393, 395 (9th Cir. 1961), where the Ninth Circuit recognized the intention of Congress to place the chore of regulating representation elections in the NLRB. See *Herald Co. v. Vincent*, 392 F.2d 354, 356 (2d Cir. 1968), where the Second Circuit noted the intention of Congress to make it difficult to obtain review by the courts.
72. See note 23 supra and accompanying text.
* Member, Second Year Class.

The constitutional "case or controversy" requirement in federal litigation has imposed certain restrictions on the ability of litigants to have their claims decided by the federal judiciary.1 It has often been said that some tangible controversy must exist before a decision determining the rights and duties of the parties can be rendered.2 This controversy must presently exist and be between real parties; federal courts will not hear cases where the issues have become moot.3 This Note

1. U.S. Const. art. III, § 2. An actual case or controversy is required. Muskrat v. United States, 219 U.S. 346 (1911). Such case or controversy must be ripe. United Public Workers v. Mitchell, 330 U.S. 75 (1947). The federal courts will refuse to hear collusive suits. United States v. Johnson, 319 U.S. 302 (1943). Furthermore, the party must have standing to sue. Tileston v. Ullman, 318 U.S. (1943). This "standing" requirement has recently been stated to mean that the party bringing the suit must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). For a recent liberalization of the standing requirement, see Flast v. Cohen, 392 U.S. 83 (1968). Although well beyond the scope of this note, certain exceptions to strict adversarial procedures have arisen, especially in the state courts. E.g., People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952).

2. E.g., Nashville, Chicago & St. Louis Ry. v. Wallace, 288 U.S. 249 (1933); Muskrat v. United States, 219 U.S. 346 (1911); South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1892). See also Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1003 (1924). "The stuff of these contests are facts, and judgment upon facts. Every tendency to deal with them abstractly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions unrelated to actualities."

3. E.g., St. Pierre v. United States, 319 U.S. 41 (1943); Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 514 (1911); Mills v. Green, 159 U.S. 651 (1895). See also Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772 (1955). "Under the Federal Constitution, the courts of the United States can render decisions only in 'cases' and 'controversies.' However, these terms inherently are capable of many varying interpretations and have never been defined authoritatively. Hence, any restriction of judicial power created by construction of such terms may properly be termed self-imposed. In determining what acts fall outside the scope of the judicial function, courts have established the rule that they have no power to decide moot cases.

"The most important and basic reason for judicial denial of the power to decide moot cases is one which lies at the very heart of common-law jurisprudence. Our basic legal philosophy is premised on the theory that the best way to achieve a wise resolution of disputed legal matters is to allow each party his day in court to present his views, with opportunity to challenge and rebut those of his opponent. This adversary system depends upon self-interest as the motive best suited to bring all pertinent facts, policies and legal issues before the court. When one party to an action has nothing to gain from a decision in his favor, many of the advantages of the adversary system are likely to be lost, since a disinterested person probably will not exert the same effort to bring all considerations before the court as one about to be affected ad-
will analyze the Ninth Circuit's per curiam decision in *NLRB v. Raytheon Co.*, which held that events occurring subsequent to the National Labor Relations Board's cease and desist order have rendered moot, on appeal and petition for enforcement, the issue of the initial propriety of the Board's order.

The NLRB Proceedings

On January 4, 1965, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE) filed a petition seeking to be established as the labor representative of Raytheon's Mountain View, California, plant. The election, conducted by the Board on February 4, 1965, resulted in 161 votes for the IUE, 54 for the International Brotherhood of Electrical Workers, and 301 votes for no union. One week later the IUE filed a petition to set aside the election, and on April 6, 1965, unfair labor practice charges were filed. The issues of unfair practices and objections to the election were consolidated before the Board. Thereafter, the Board found unfair labor practice violations and consequently ordered Raytheon to cease and desist from questioning employees about union activities, threatening losses of existing benefits if union representation were chosen, threatening an anticipatory refusal to bargain in good faith, and coercing and inter-


5. See the NLRB rules in 29 C.F.R. §§ 102.60-.72 (1969) for representation procedures governing section 9(c) of the National Labor Relations Act, 29 U.S.C. § 159(c) (1964).


7. The petition was filed pursuant to 29 C.F.R. § 102.69 (1969).

8. The grounds relied on by the union to set aside the election were twofold: (1) Practices of the employer during the election campaign regarding union solicitation, canvassing, and distribution of union literature, and (2) certain coercive speeches and statements by the employer before the election, also relied on in the union's subsequent unfair labor practice charge against the employer. See note 9 infra.

9. The IUE's unfair labor practice petition alleged Raytheon had violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) (1964), by employer speeches given to employees prior to the election. Raytheon Co., 160 N.L.R.B. 1603, 1606-09 (1966). Section 8(a)(1) states 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.” Section 7, 29 U.S.C. § 157 (1964): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."  

10. See note 9 supra.
ferring with employees' right to self-organize and form labor unions.\textsuperscript{11}

Interwoven yet distinct from the alleged unfair labor practices was the other issue in the consolidated proceeding: whether Raytheon's methods of discouraging union representation during the IUE's pre-election campaign went beyond the permissible bounds of employer free speech. The issue was resolved in favor of the union; the Board found that Raytheon's policies against union campaign solicitation, canvassing, and distribution of literature "effectively foreclosed" the IUE "from presenting its claims and arguments to employees while they were on company premises."\textsuperscript{12} While the Board no longer demands pure "laboratory conditions\textsuperscript{13}" for election procedures, conduct of the employer such as the Board found in Raytheon, which substantially interferes with the fair resolution of an election, does merit setting aside that election.\textsuperscript{14} In addition, it is well-settled policy that any conduct violative of section 8(a)(1) of the Act\textsuperscript{15} a fortiori interferes with the election and warrants its nullification by the NLRB.\textsuperscript{16} It appears, therefore, that the Board rested its decision to set aside the election on two grounds, either of which seems sufficient.\textsuperscript{17}

The Board pursuant to statute\textsuperscript{18} sought enforcement of its cease and desist order in the Ninth Circuit. With leave of court, Raytheon

\bibitem{raytheon1} Raytheon Co., 160 N.L.R.B. 1603, 1604-05, 1611 (1966). The Board, for the most part, affirmed the trial examiner's findings of fact and law. For the minor Board modifications and additions to the trial examiner's order, see Raytheon Co., 160 N.L.R.B. 1603, 1604-05 (1966). See 29 C.F.R. §§ 102.34-.45 (1969) for the functions and duties of the trial examiner and for provisions regarding transfer from the examiner to the Board.

\bibitem{raytheon2} Raytheon Co., 160 N.L.R.B. 1603, 1610 (1966). "[T]he union can file objections to the election alleging that because of the conduct of . . . the employer . . . the employee has not been able to exercise his 'fullest freedom [of] the rights guaranteed by this Act.'" Note, \textit{National Labor Relations Act Election: Post-Election Objections}, 38 \textit{TEMP. L.Q.} 288, 289 (1965).

\bibitem{raytheon3} The requirement that elections be conducted under laboratory conditions was first enunciated in the landmark case, General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). Any conduct which upsets these laboratory conditions was sufficient to set aside the election. Subsequently, it appeared, however, that such guidelines were unrealistic, especially in light of the Board's increasing caseload. See Bok, \textit{The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act}, 78 \textit{HARV. L. REV.} 38, 45 (1964); 21 \textit{HASTINGS L.J.} 1020 (1970).


\bibitem{raytheon5} 29 U.S.C. 158(a) (1) (1964); see note 9 supra.


\bibitem{raytheon7} The Board did feel that the employer's restrictions on the union's pre-election campaign were alone sufficient to merit setting aside the election. Raytheon Co., 160 N.L.R.B. 1603, 1610 (1966).

\bibitem{raytheon8} 29 U.S.C. § 160(e) (1964).
was permitted to supplement the record and move for dismissal of the proceedings on the ground the controversy had been mooted because a second election, certified by the Board, had produced the same results as the first.\textsuperscript{19} The Ninth Circuit, on the authority of \textit{General Engineering, Inc. v. NLRB},\textsuperscript{20} granted the employer's motion and dismissed the proceedings.

The facts in \textit{General Engineering} were substantially the same as those in \textit{Raytheon}. A representation election was held but no labor union gained representation; one union petitioned to set aside the election; and unfair labor practice charges were later brought. In a consolidated hearing, the Board issued a cease and desist order and set aside the election. A second election was held, with the same results, and this time the Board certified the results.\textsuperscript{21} On the employer's petition for review of the order made pursuant to the first election and the Board's cross-petition for enforcement, the Ninth Circuit held that certification of the second election results made "moot all portions of the order which relate to the representation case."\textsuperscript{22} The Court stated that since the second election "was properly held under circumstances which permitted the employees to freely choose their bargaining representative without restraint, coercion, [or] threatened reprisals of interference by petitioners," the issue of the offensive conduct preceeding the first election was moot.\textsuperscript{23}

It is submitted that the Ninth Circuit in \textit{Raytheon} and \textit{General Engineering} failed to analyze properly the nature and purpose of the Board's cease and desist order. A brief exploration of the factual and legal nature of the Board's order will demonstrate the court's improper disposition of these cases.

\textsuperscript{19} NLRB v. Raytheon Co., 408 F.2d 681 (9th Cir. 1969).
\textsuperscript{20} 311 F.2d 570 (9th Cir. 1962).
\textsuperscript{21} The Board certified "that a majority of the valid ballots had not been cast for any labor organization appearing on the ballot, and that no such organization is the exclusive representative of all the employees in the unit here involved, within the meaning of . . . the . . . Act." \textit{Id.} at 572. See 29 C.F.R. \textsection{} 102.69(b) (1969) for certification procedures.
\textsuperscript{22} 311 F.2d at 572. The portion of the order which so related ordered the employer to cease and desist from "interrogating any of their employees with respect to any employee's activities, membership, or interest in, or connection with, any labor organization in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the . . . Act; promising . . . any of their employees that they will be given a wage increase or recreational facilities or any other benefit or advantage if they reject or forgo union representation or abstain from any activity in, or on behalf of, any labor organization; threatening or otherwise informing any of their employees that if they select a collective-bargaining representative, the Respondent will refuse or decline to negotiate or bargain . . . ." \textit{General Eng'r, Inc.}, 131 N.L.R.B. 648, 651-52 (1961).
\textsuperscript{23} 311 F.2d at 572.
Consolidation of Proceedings Before the NLRB

Since both the unfair labor practice charges and the objections to the election proceedings in *Raytheon* and *General Engineering* were consolidated before the Board, the Ninth Circuit panels may have confused the two issues. Unfair labor practices are not litigable in representation proceedings.24 This is not to say, however, that in such proceedings, conduct which would amount to an unfair labor practice is excluded from Board consideration. To the contrary, in determining the validity of an election, the Board considers all relevant interference with the election, but without regard to whether the conduct could also be denominated an unfair labor practice.25 Since in *Raytheon* and *General Engineering*, the proceedings were consolidated, the conduct amounting to an unfair labor practice was also partially relied upon to set aside the elections.26 Because it misconstrued the order under review, the Ninth Circuit seems to have confused the overlapping aspects of representation and unfair labor practice proceedings.27 It should be stressed that the court in *Raytheon* and *General Engineering* was called upon to review or enforce the Board's cease and desist


26. See text accompanying notes 16 & 17 supra.

27. It should be noted that it is the policy of the Board not to conduct representative elections during the pendency of unfair labor practice cases unless the union requests an early election and agrees not to protest on the basis of unremedied unfair labor practices. NLRB v. Trimfit of Cal., 211 F.2d 206, 209 n.2 (9th Cir. 1954). Where one of the parties, therefore, engages in preelection conduct which interferes with the election, the complaining party has two choices: (1) File unfair labor practice charges which will require postponement of the election until final determination of the charge, or (2) await the outcome of the election, moving to set it aside if it loses. In the latter situation the unfair labor practices may continue unchecked, possibly resulting in the union's defeat in an upcoming election. A refusal to enforce the cease and desist order because of mootness could have such a resulting effect, thus encouraging rather than preventing unfair labor practices. The unfair practice, no matter how blatant, would never be subject to a remedial order, enforceable by a court, if the second election, as in *Raytheon*, were certified by the Board. If the Ninth Circuit reasoned that fairly conducting the second election constituted compliance with the Board's initial order, it is well-settled that compliance, in itself, is no defence to a suit for enforcement. NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, 225 n.7 (1949); Walling v. Youngman-Reynolds Hardware Co., 325 U.S. 419 (1945); NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 271 (1938); NLRB v. Hecks, Inc., 369 F.2d 370, 371 (6th Cir. 1966); NLRB v. Rippee, 339 F.2d 315 (9th Cir. 1964) (per curiam); NLRB v. Marsh Supermarkets, Inc., 327 F.2d 109 111 (7th Cir. 1963); Lakeland Bus Lines, Inc., v. NLRB, 278 F.2d 888, 891-92 (3d Cir. 1960); NLRB v. Trimfit of Cal., 211 F.2d 206, 208 (9th Cir. 1954).
order, not set aside the election. The Board requested enforcement in order to remedy the unfair labor practices. The Board's subsequent certification of the second election, it is submitted, should have no effect on the distinct unfair labor practice charge.

Purpose of a Cease and Desist Order

The Ninth Circuit's decision in General Engineering upon which the dismissal in Raytheon rested, was premised on the following dictum from the Supreme Court in NLRB v. Jones & Laughlin Steel Corp.: When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration. For example, where the order obviously has become moot, the court can deny enforcement without further ado; but where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order. The Court in the Jones & Laughlin Steel case, however, found that the particular issue before it was not moot, pointing out that "[t]he order was a continuing command which may be effectuated in the future. . . . Hence its validity must be judged as of the time when it was issued . . . ." In a later case, NLRB v. Mexis Textile Mills, Inc., the Supreme Court dispelled the notions of any who might have felt that the Court in Jones & Laughlin Steel intended to put forth a generally applicable doctrine of mootness: "A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree."

In Raytheon, the Board had found that the employer's conduct before the first election amounted to an unlawful coercion in violation of the employee's right to self-organization and ordered it to cease and desist from questioning employees about union activities, from im-

28. See National Labor Relations Act § 9(c), 29 U.S.C. § 160(c) (1964): "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person . . . has engaged in or is engaging in any . . . unfair labor practice . . . the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practices . . . ."


31. Id. at 428.
32. Id. at 422.
34. Id. at 567.
35. See text accompanying note 11 supra.
plying that employees would lose existing benefits if union representation were chosen, and from refusing to bargain in good faith. From a legal standpoint, the Ninth Circuit's determination that a second fairly conducted election made such conduct a moot issue seems clearly erroneous on three grounds.

First, even though much of the damage caused by an employer's initial unfair labor practices has already occurred, this is no basis for denying enforcement on grounds of mootness. Any remedial order issued by the Board and properly enforced by the court only works after the fact and "ignores the time lost by the union until the date of the NLRB decision and the time needed to counteract the original impediment to organization activity." This lost time may very well dissipate any momentum the union may have generated during the election campaign.

Second, and closely related to the first, the past unfair labor practices may deter workers from jumping on the union's bandwagon, while the threat of similar future employer misconduct may dissuade possible union sympathizers from supporting a unionization drive. But if the workers were to know that a court had said that the employer's conduct was improper, must be terminated, and can not be resumed, union activity might again step up. Indeed, one of the primary purposes of a Board order of this type is to prevent an employer from enjoying "any advantage which he has gained by violations of the Act" and to "re-establish the status quo which existed before the employer committed his unfair labor practices . . . ." On these grounds alone, the Ninth Circuit should have enforced the order in Raytheon.

A third and final factor militating against a finding of mootness is that without a remedial order, the conduct complained of as an unfair practice may be repeated at some time after the second election. Clearly, one of the primary purposes of a remedial order is to bar any future employer violations, and the purpose of the National Labor

36. See text accompanying note 11 supra.
38. See NLRB v. Clark Bros. Co., 163 F.2d 373, 375 (2d Cir. 1947), where the court pointed out that a union can reasonably be expected to continue its organizational drive, perhaps filing a petition for a later election.
41. "[U]nless the court is persuaded that the defendant would probably not resume the alleged violations of law upon removal of that pressure, a justiciable controversy remains and the case will not be dismissed as moot." Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U.Pa. L. Rev. 125, 146 (1946).
Relations Act is not facilitated by unneeded litigation when an early remedial decree enforced by the court would settle the matter once and for all.

In establishing the NLRB to implement the policies of the National Labor Relations Act, Congress endowed it with the power to hear complaints and grievances and make various policy determinations pursuant to the guidelines of the Act. Section 10(c) provides in part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person . . . has engaged in or is engaging in any . . . unfair labor practice . . . the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action . . . as will effectuate the policies of this subchapter . . . .

In interpreting the Act, the courts have stated that it "charges the Board with the task of devising remedies to effectuate the policies of the Act"; 44 "[i]n fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." 45

It is submitted that the Ninth Circuit by overturning the Board's decision in Raytheon has prevented the Board from performing this legislative mandate. The Board's action should receive the court's approval if it is not "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." 46 In Raytheon, the policies of the Act could have been effectuated only by enforcement of the Board's order. The finding of mootness by the Ninth Circuit may very well encourage rather than prevent violations of the Act. As the Supreme Court has stated: "[A]n order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." 47

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