LABOR LAW
Unfair Labor Practices • Evidentiary Hearing • Coercive Conduct

ATR Wire and Cable Co. v. NLRB
671 F.2d 188 (6th Cir. 1982)

I. INTRODUCTION

THE NATIONAL LABOR RELATIONS ACT is principally designed to promote industrial harmony by encouraging collective bargaining and by protecting the right of workers to designate representatives to negotiate the terms and conditions of their employment. As its enforcing mechanism, the Act provides for the creation of the National Labor Relations Board (NLRB or Board).

The Board's primary functions are to determine the employees' choice of a bargaining representative and to protect the employees from unfair labor practices. Section 9 of the Act provides the NLRB with broad discretionary powers to establish rules for conducting representation elections and for determining the validity of these elections. Typically, proceedings to determine the validity of election results tend to be more investigatory than adversarial in nature. Accordingly, 29 C.F.R. § 102.69 gives an objecting party the right to seek an evidentiary hearing.

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5The Board's authority to conduct representation elections derives from § 9(c) of the Act. This section states in relevant part: "If the Board finds . . . that such question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U.S.C. § 159(c) (1976). The details of the conduct of the elections remains unspecified by the Act. R. WILLIAMS, P. JANUS, & K. HUHN, LABOR RELATIONS AND PUBLIC POLICY SERIES, REPORT No. 8, at 4 (1974) [hereinafter cited as REPORT No. 8]. The United States Supreme Court has interpreted this section as granting the NLRB broad discretionary powers for promulgating procedural rules for conducting representation elections. NLRB v. A.J. Towers, Co., 329 U.S. 324, 330-31 (1946).


629 C.F.R. § 102.69 (1982). This section governs the processing of election objections. Id. For discussion of NLRB election procedures, see T. KAMMHOFL & K. MCGUINESS, PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD (2d ed. 1966).
to an evidentiary hearing only when the Regional Director or the Board decides that a material factual issue may be more appropriately resolved by a hearing. Traditionally, the Sixth Circuit Court of Appeals has closely adhered to this strict standard. It has done so in compliance with one of the foremost policies of the Act — the alleviation of labor unrest by expediently certifying bargaining units. ATR Wire and Cable Co. v. NLRB, however, represents the current willingness of the Sixth Circuit to de-emphasize the importance of expeditiously certifying bargaining representatives. First, the circuit will not hesitate to remand a case with direction to the NLRB to conduct an evidentiary hearing when it determines that the Board adopted the Regional Director’s recommendation to certify a bargaining unit without reviewing the evidence upon which the Director has relied. Secondly, the court will remand when the coercive conduct of union adherents prior to the election may have precluded the employees’ fair selection of bargaining representative.

1"In order to keep pace with its burgeoning representation caseload, the Board, in 1961, exercised its authority under section 3(b) of the Act to delegate its power in election cases to its regional directors." REPORT No. 8, supra note 5, at 7.

29 C.F.R. § 102.69(d) (1982). See supra note 6 and accompanying text.

3The Sixth Circuit, in the case of NLRB v. Tennessee Packers, Inc., 379 F.2d 1972 (6th Cir.), cert. denied 389 U.S. 958 (1967), found that the first union election had been properly set aside because the company had interfered with the employees’ free choice by adopting benefits shortly before the election. The court ordered the company to bargain with the union and denied it a hearing on its election objections. In so doing, the court established the rule that an objecting party must define its disagreements with the Regional Director’s report and offer evidence to support its contrary findings in order to entitle it to an evidentiary hearing. Id. See generally Jackson & Heller, Promises and Grants of Benefits under the National Labor Relations Act, 131 U. PA. L. REV. 1 (1982).

1029 U.S.C. § 151 (1976). Justice Brennan, in discussing Congress’ intent in enacting the NLRA, emphasized the conclusion of Congress “that the change for industrial peace increased correlatively to how quickly collective bargaining commenced.” Leedom v. Kyne, 358 U.S. 184, 192 (1958) (Brennan, J., dissenting). Justice Brennan further stressed Congress’ intent to limit judicial review of certification orders. Such time-consuming review might merely frustrate the policies of the Act and the promotion of industrial harmony. Id. at 191-93 (Brennan, J., dissenting). (Dissenting from the majority view that the Act permits direct judicial review of the NLRB’s determination of an appropriate bargaining unit).

The Fifth Circuit determined that the NLRA implicitly requires that representation questions be expeditiously handled and post-election objection hearings be sparingly granted in order to promote the policies of the Act and to prevent objectioning parties from delaying the certification of legitimately victorious bargaining units. NLRB v. O.K. Van Storage, Inc., 297 F.2d 74 (5th Cir. 1961).

The Supreme Court, in conformity with Congressional intent and the express mandate of § 10(e), 29 U.S.C. § 160(e) (1976), has determined that its scope of review of Board orders is limited to ascertaining whether substantial evidence, considered on the record, as a whole supports the Board’s action. See NLRB v. A. J. Tower Co., 329 U. S. at 330-31; Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-78 (1958). Furthermore, the judiciary may not review Board actions de novo. Rather, it must limit its review to whether the Board has acted in an arbitrary and capricious manner. Universal Camera, 340 U.S. at 488. For further discussion of the courts’ acquiescence to Board expertise in regulating pre-election conduct, see Getman, Goldberg, & Herman, NLRB Regulations of Campaign Tactics: The Behavioral Assumptions on which the Board Regulates, 27 Stan. L. Rev. 1465 (1975) [hereinafter cited as Behavioral Assumptions]. For an empirical study questioning the Board’s expertise, see Getman & Goldberg, The Myth of NLRB Expertise, 39 U. Chic. L. REV. 681 (1972).

11671 F.2d 188 (6th Cir. 1982).
II. BACKGROUND OF THE CASE

A representation election conducted at ATR Wire and Cable Company's Kentucky plant resulted in a narrow, seven-vote victory for the Union. The company raised eleven specific contentions accompanied by employee affidavits alleging that threats and acts of vandalism by Union proponents created a coercive atmosphere preventing a fair election.

Upon receiving the election objections, the Regional Director conducted an administrative investigation pursuant to 29 C.F.R. § 102.69(d). He obtained the affidavit of a Union staff organizer. Relying exclusively upon this affiant's disclaimer of Union responsibility for the threats and acts of vandalism by the Union adherents, the Regional Director overruled the company's objections. He then recommended that the Board certify the Union as the exclusive bargaining representative of the ATR Wire employees.

ATR Wire submitted timely exceptions to the Regional Director's report. Without first reviewing the evidence upon which the Director had based his conclusions, the NLRB adopted the recommendations of the Director. In so doing, the NLRB ruled that ATR Wire's exceptions did not entitle it to a hearing. It particularly noted the absence of evidence linking the Union with the threats and acts of violence by the Union adherents. Pursuant to the authority of section 9, the Board certified the Union as the exclusive bargaining representative of the ATR Wire employees.

Such certification orders are not considered final orders within the meaning of section 10(e) of the Act. Consequently, they are not subject to direct judicial review by the federal appellate courts. Thus, in order to obtain judicial review

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12Id. at 189.
13Id.
14Id. The affiants alleged that the Union proponents had threatened them with physical harm and refusal to cooperate at work. They further alleged that their cars had been vandalized shortly after they had publicly expressed support for the company. Id.
1529 C.F.R. § 102.69(d) (1982). This section permits the Regional Director to determine whether election objections are serious enough to warrant setting aside an election on the basis of an administrative investigation or an evidentiary hearing. Id.
16671 F.2d at 190.
17Id. at 189-90.
18Id.
19Id. at 189-90.
20Id. at 189.
21Id. at 190.
22Id. at 189.
24American Fed'n of Labor v. NLRB, 308 U.S. 401, 406-07 (1940). In order to obtain judicial review an employer must follow a circuitous procedure. It must refuse to bargain with the union, subject itself to an unfair labor practice proceeding, assert as its defense that the Board erred in the representation proceedings, wait to be found guilty of an unfair labor practice, and seek judicial review of Board orders.
review, ATR Wire committed an unfair labor practice by refusing to bargain with the newly certified Union. In the unfair labor practice proceeding against it, ATR Wire asserted as its defense that the Board had improperly certified the Union. Finding ATR Wire guilty of this unfair labor practice, the NLRB directed the company to bargain with the Union.

Because Board orders are not self-executing, the Board, pursuant to section 10(f) of the Act, petitioned the Sixth Circuit for enforcement of its bargaining order. ATR Wire was then entitled to have the circuit review the certification order, since the court’s denial or enforcement of the bargaining order would depend upon the propriety of the Board’s underlying certification order.

The Sixth Circuit Court of Appeals denied enforcement of the Board’s bargaining order. The court instead remanded the case to the Board, directing it to conduct an evidentiary hearing on ATR Wire’s election objections and exceptions.

The court ruled, in accordance with precedent, "[t]hat the Board abuses its discretion by adopting a Regional Director’s report if the Director fails to transmit to the Board all the evidence upon which the Director relies." The court noted that the Board had abused its discretion in this case by adopting the Director’s report without having reviewed the affidavit of the Union staff organizer. This affidavit, the court concluded, had clearly influenced the factual determinations of the Director.

Secondly, the court ruled that ATR Wire had sufficiently demonstrated the existence of material issues entitling it to a hearing. Based upon the fifteen employee affidavits, the court stressed that the pre-election atmosphere may have rendered a fair election impossible despite broad participation in the election, ability of the company proponents to attend Union meetings, and no indication of coerced voting. The court further determined that the question

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25 Id.
26 Id.
27 Id.
29 Id. at 190 (citing NLRB v. Curtis Noll Corp., 634 F.2d 1027 (6th Cir. 1980); Prestolite Wire Div. v. NLRB, 592 F2d 302 (6th Cir. 1979)).
30 Id. at 190.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
39 Id.
40 See Goldberg, supra note 24, at 456.
41 Id. at 189.
42 Id.
43 Id.
of Union responsibility for the threats and acts of vandalism would have been more appropriately resolved through a hearing.\textsuperscript{36}

Chief Judge Edwards delivered a strong dissenting opinion\textsuperscript{37} based upon the doctrine established by the Sixth Circuit in \textit{NLRB v. Tennessee Packers, Inc.}\textsuperscript{38} He implied that ATR Wire had failed to specifically state its controversies with the Director's report or to proffer specific evidence supporting its conclusions as required by \textit{Tennessee Packers}.\textsuperscript{39} Accordingly, he would have enforced the Board's bargaining order.\textsuperscript{40}

The Chief Judge expressed his fear that the subsequent delays caused by conducting hearings on all election exceptions would compromise the essential purpose of the National Labor Relations Act.\textsuperscript{41} He warned against wide adoption of the majority stance, stating:

The current delay in Board and Court processing of union certification disputes (currently two years and nine months in this case) is already completely inconsistent with the purpose of the National Labor Relations Act. For the courts routinely to return all election disputes for hearings will create a strong tendency to take labor/management industrial conflicts out of the National Labor Relations Board and judicial processes and return them to the streets.\textsuperscript{42}

### III. Necessity for a Hearing on Election Objections

\textit{Tennessee Packers} established the standard that an objecting party must meet in order to obtain an evidentiary hearing in the Sixth Circuit.\textsuperscript{43} That court, in enforcing a bargaining order against the employer, defined the rigid stan-

\textsuperscript{36}Id.
\textsuperscript{37}671 F.2d at 190 (Edwards, C. J., dissenting).
\textsuperscript{38}Tennessee Packers, 379 F.2d at 172.
\textsuperscript{39}671 F.2d at 190.
\textsuperscript{40}Id.
\textsuperscript{41}Id. at 191.
\textsuperscript{42}Id. For the fiscal years July, 1972, through September, 1978, the NLRB conducted 45,115 representation elections. In cases where no objections were filed, the Board closed its proceedings in an average time of 21 days. Where the unions objected, that closing time increased to approximately three months. Four and one-half months were required to finalize election results where the employer filed objections. These additional months are significant because union support tends to diminish as the length of time needed to finalize election proceedings increases. Roomkin & Block, \textit{Case Processing Time and the Outcome of the Representation Elections: Some Empirical Evidence}, 1981 U. ILL. L. REV. 75-97. For a discussion of how inconsistent NLRB adjudications provide objecting employers the opportunity to prolong finalizing union victories in an effort to erode union support, to divert union resources from building an organization to paying legal expenses, and to save the possible expense of increasing employee benefits, see Samoff, \textit{NLRB Elections: Uncertainty and Certainty}, 117 U. PA. L. REV. 228, 234-41 (1968).
\textsuperscript{43}379 F.2d at 178. In formulating this rule, the Sixth Circuit drew on opinions from the Third, Seventh and Ninth Circuits, see, e.g., Macomb Pottery Co. v. NLRB, 376 F.2d 450 (7th Cir. 1967); NLRB v. Sun Drug Co., 359 F.2d 408 (3d Cir. 1966); NLRB v. J. R. Simplot Co., 322 F.2d 170 (9th Cir. 1963).

Other circuits have expressly adopted this rule. See, e.g., NLRB v. Target Stores, 547 F.2d 421, 425 (8th Cir. 1977); United Steelworkers of Am. v. NLRB, 496 F.2d 1342, 1348 (5th Cir. 1974); NLRB v. Americana Nursing Home, Inc., 459 F.2d 26, 28 (4th Cir. 1972); Lipman Motors, Inc. v. NLRB, 451 F.2d 823, 827 (2d Cir. 1971); Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 418 F.2d 1191, 1196-97 (D.C. Cir. 1969).
dard by stating, "[i]t is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion." The court further determined that the NLRB is entitled to rely upon the report of the Regional Director when the objecting party has failed to satisfy these two requisites.

*ATR Wire* exemplifies a trend in the Sixth Circuit which maintains the viability of the *Tennessee Packers* rule. The court will require a party seeking a hearing to define its disputes and proffer evidence to support its contrary conclusions. According to *ATR Wire*, however, the court will more readily find that a party has fulfilled this strict evidentiary burden when the Board has merely "rubber-stamped" the Regional Director's report and when the conduct of Union adherents may have rendered impossible the free selection of a bargaining representative by the employees.

### A. Failure to Transmit the Entire Record

The *Tennessee Packers* decision, although permitting the NLRB to rely upon the Director's report when the objecting party failed to satisfy its burden, did not address the Director's failure to transmit the entire record. *Prestolite Wire Div. v. NLRB*, was the first case in the circuit to expressly characterize the Board's certification of a bargaining unit without benefit of the record or a hearing as an abuse of discretion. The court ruled that according to the plain language of 29 C.F.R. § 102.69(g), the Regional Director should have transmitted the entire record of the administrative investigation to the Board. Failure to transmit the entire record hindered the Board and the court in reviewing the fairness of the credibility findings and factual determinations which form the basis of the Director's recommendation.

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4379 F.2d at 178.

4*Id.*

4Subsequent decisions in the Sixth Circuit expressly reaffirm the viability of Tennessee Packers but hold that only in proper cases may election objections be resolved on the basis of an administrative investigation alone. *See, e.g.*, *NLRB v. North Elec. Co.*, 644 F.2d 580, 583 (6th Cir. 1981); *Prestolite Wire Div. v. NLRB*, 592 F.2d 302, 305 (6th Cir. 1979).

4*North Elec.*, 644 F.2d at 584. The court used this term to describe the activity of the Board when it adopts the Regional Director's report without reviewing the underlying evidence. The court termed the Board's failure as an abdication of its responsibilities under the Act. *Id.*

4*ATR Wire*, 671 F.2d 188.

4379 F.2d at 178.


529 C.F.R. § 102.69(g) (1982). This section describes the record to be transmitted to the Board as containing a stenographic report of the hearing, exceptions, and documentary evidence, together with objections, briefs, or other legal memoranda submitted by the parties, and the decision of the Regional Director. *Id.*

5*Prestolite Wire*, 592 F.2d at 305. The court concluded that absent the 19 employee affidavits recounting union threats as well as the evidence gathered by the Director, the Board could not have fairly considered Prestolite's 73 objections. *Id.* at 306.

5*Id.*
Two years after *Prestolite Wire*, the Sixth Circuit decided *NLRB v. North Electric Co.* Presenting the identical procedural posture as *Prestolite Wire,* the court once again determined that the Board abuses its discretion by adopting the Regional Director's report when the Director has failed to transmit the entire record. In addition, the court discussed the remedial steps available upon a determination that the Board has abused its discretion in this manner.

First, the court must construe the factual assertions in the objections most favorably to the objecting party. If the objections raise substantial factual disputes with the Director's report, then the court may direct the Board to conduct an evidentiary hearing. If, however, the assertions fail to raise substantial factual controversies, the court has the option of instructing the Board to reconsider the Director's report in conjunction with the evidence in the record.

Through *ATR Wire*, *Prestolite Wire*, and *North Electric*, the Sixth Circuit has attempted to more clearly define the applicability of the rule established in *Tennessee Packers*. The majority opinions in these cases do not contravene the policy of the NLRA which encourages the expedient certification of bargaining units in order to promote industrial harmony. Nor do they require the Board to conduct detailed hearings in practically every representation election wherein the union prevails.

The Board may still, in accordance with *Tennessee Packers*, rely upon the report of the Regional Director in those "situations where the objections themselves may be 'shotgunned' or so lacking in factual detail that they may be denied both by the Regional Director and by the Board entirely without recourse to the administrative record." The Board is excused from reviewing the underlying documentation in these cases on the theory that the failure to do so could not possibly prejudice the objecting party's case. In cases where

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1. *North Elec.*, 644 F.2d at 584.
2. *Id.* See *supra* note 52 and accompanying text.
3. *Id.* at 584-85.
4. *Id.* at 584.
5. *Id.* Although a party is entitled to a review of its election objections, Board rules do not provide for an evidentiary hearing on those objections in every case. See *supra* note 6 and accompanying text. Once a party has established its right to a hearing, the Fifth Circuit has held "[that] the investigation is not a substitute for it. The hearing may not be denied on the basis of new information obtained *ex parte* by the regional director." *NLRB v. Claxton Mfg. Co., Inc.*, 613 F.2d 1364, 1366 (5th Cir. 1980). *Accord Anchor Inns, Inc. v. NLRB*, 644 F.2d 292 (3d. Cir. 1981). It appears likewise that the Sixth Circuit has adopted this reasoning in *ATR Wire*. The court stated that the substantial factual disputes concerning agency raised by the company entitled the company to a hearing. This right, the court noted, should not have been explained away on the basis of the Union staff organizer's affidavit. 671 F.2d at 190.
6. *NLRB v. Fuelgas Co.*, 674 F.2d 529, 534 (6th Cir. 1982). The court determined that a single incident involving an anonymous mark penciled on a sample ballot failed to indicate any unfairness in the election. The court further noted that the circuit has not hesitated to remand a case where the objecting party could show some evidence of unfairness or where the Regional Director's failure could have possibly prejudiced the party's case. *Id.*
the election exceptions have some merit but do not raise substantial factual issues, delays prompted by the court's decision to remand could be avoided by the Director's transmitting the entire record in the first instance.

Thus, it appears that only in compelling situations will the court direct the Board to conduct an evidentiary hearing. The employer's objection must *prima facie* raise substantial and material factual disputes that if proven would warrant setting aside the election.62

The Sixth Circuit found that the ATR Wire and Cable Company's election objections raised, *prima facie*, substantial issues that controverted the Director's report.63 The most prevalent question, directly disputed by the parties, was that of Union responsibility for the alleged threats and acts of vandalism.64 The cumulative effect of these objections, the court noted, may well have tainted the election atmosphere and inhibited the employees' free choice.65

These Sixth Circuit decisions indicate that the court is more willing now than at the time of *Tennessee Packers* to recognize the importance of fairly hearing the objecting party even at the expense of less expeditiously certifying bargaining units.66 *ATR Wire* demonstrates that the NLRB policy of avoiding protracted delays and dilatory tactics in representation election proceedings cannot operate to deprive an employer of a hearing when it is entitled to one.67

**B. Threats by Union Adherents**

Since the enactment of the National Labor Relations Act in 1935, the Board has vacillated concerning the degree to which it will regulate the pre-election conduct of both employees and unions in order to safeguard the workers' free

62 *ATR Wire*, 671 F.2d at 190. It is well established that courts will insist upon an evidentiary hearing when a party's objections raise substantial and material issues of fact. See, e.g., *Methodist Home v. NLRB*, 596 F.2d 1173, 1178 (4th Cir. 1979); *NLRB v. S. Prawer & Co.*, 584 F.2d 1099, 1102 (1st Cir. 1978); *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704, 706-07 (2d Cir. 1978); *Sonoco Prods. Co. v. NLRB*, 399 F.2d 835, 839 (9th Cir. 1968).

As a corollary, no hearing is necessary where the Board assumes the alleged facts as true but determines that the challenged conduct does not constitute legal justification for setting the election aside. *NLRB v. Sun Drug Co.*, 350 F.2d 408 (9th Cir. 1966). *See also NLRB v. Campbell Prods. Dep't*, 623 F.2d 867 (3d Cir. 1980).

63 671 F.2d at 190. See *supra* text accompanying notes 17-37.

64 671 F.2d at 190.

65 *Id.* "[I]f the employer has objected to must be considered cumulatively rather than as isolated incidents . . ." *Home Town Foods, Inc. v. NLRB*, 416 F.2d 392, 397 (5th Cir. 1969). The *ATR Wire* majority noted that the director had dismissed the cumulative effect of the alleged conduct on the election and focused on the lack of evidence establishing an agency relationship between the Union and the Union proponents. 671 F.2d at 190.

66 "Decisions of the Sixth Circuit indicate that the due process rights of an objecting party are indeed violated when it has raised material and substantial factual disputes but the NLRB or judiciary has denied it an evidentiary hearing. *See, e.g., NLRB v. Forest City Enters., Inc.*, 663 F.2d 34, 36 (6th Cir. 1981); *North Elec.*, 644 F.2d at 583; *Prestolite Wire*, 592 F.2d at 303; *NLRB v. Medical Ancillary Serv.*, 478 F.2d 96, 99 (6th Cir. 1973). *Accord NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1068 (5th Cir. 1973).

67 "The Fifth Circuit used this language in ruling that the NLRB had acted arbitrarily and capriciously in denying an employer who had raised material factual disputes a hearing on his election objections. *United States Rubber Co. v. NLRB*, 373 F.2d 602, 607 (5th Cir. 1967)."
choice of bargaining representation. The August, 1982, Board decision in *Midland National Life Insurance Co.* espouses the Board's current philosophy. Relying upon the sophistication of today's workers, the Board will no longer review the substance of campaign statements. It will, however, invalidate an election because of the deceptive manner in which the statements were made. While an employee can presumably evaluate misleading propaganda, he still cannot shield himself against fraudulent practices by his employer or union. While advocating a more lenient standard with respect to campaign misrepresentation, *Midland* expressly reaffirms the Board's policy of protecting "against other campaign conduct such as threats, promises, or the like, which interferes with employee free choice."

Traditionally, the Board and the courts have been reluctant to set aside election results on the basis of conduct not attributable to either the employer or the union. They will, nevertheless, invalidate an election when the coercive

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44 Originally, the Board concerned itself solely with conduct tending to coerce employees in their election decisions and chose to leave unregulated campaign propaganda. *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. No. 24, 1982-83 NLRB Dec. (CHL) 15,072 (1982). In 1948, the Board announced in *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948) that it must conduct elections in laboratory conditions in order to safeguard the employees' uninhibited choice of bargaining representative. Should these laboratory conditions not be met, the Board declared that it must rerun the experiment. *Id.*

Subsequent Board decisions built their conceptual framework upon *General Shoe* but deviated from Board policy by reviewing the truth or falsity of campaign statements. *See, e.g.*, *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962); *The Gummed Prods. Co.*, 112 N.L.R.B. 1092 (1955). According to *Hollywood Ceramics*, the Board may invalidate an election when a statement constitutes a substantial departure from the truth and is uttered at a time that prevents the other parties from effectively replying. 140 N.L.R.B. at 224.

In 1977, the Board overruled *Hollywood Ceramics*, stating that it would rely on the maturity of the electorate to recognize and discount campaign propaganda. *Shopping Kart Food Mkt.*, 228 N.L.R.B. 1311, 1313 (1977). Thus, the Board would set election results aside only where the parties engaged in fraudulent practices, abused Board procedures, threatened employees, or improperly granted benefits. *Id.*

This remained Board policy for only twenty months. The Board reinstated *Hollywood Ceramics* in *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). The Board then, within five years, reversed its position and re-adopted the *Shopping Kart* policy. Advocates of the Shopping Kart-Midland approach reason that this rule is realistic, easy to apply, and lends itself to definite, predictable, and speedy results in conformity with NLRB policy. See *Van de Water, New Trends in NLRB Law*, 33 LAB. L.J. 635, 640-41 (1982).

The federal courts may greet this most recent Board ruling with skepticism, as indicated by dictum in *Donovan v. Local 719, United Auto., Aerospace, Agricultural Implement Workers of Am.*, 591 F. Supp. 54 (N.D. Ill. 1982). That court found *Midland* to be unpersuasive, viewing it merely as the latest of the Board's seemingly incessant shifts regarding campaign literature. *Id.* at 62.


46 N.L.R.B. No. 24.

70 *Id.*

71 *Id.*

72 REPORT No. 8, *supra* note 5, at 158. The Board has explained that it will attribute minimal weight to the conduct of mere rank-and-file employees, reasoning that such actions have a less coercive impact on workers. Furthermore, since third parties have no economic interest in conclusive election results, as do unions and employers, according their conduct greater weight would encourage them to disrupt elections. *Orleans Mfg. Co.*, 120 N.L.R.B. 630, 633-34 (1958).
conduct of union adherents has so tainted the pre-election atmosphere that workers based their votes upon fear rather than conviction.73 Thus, the conduct of third parties will be considered in determining whether the employees freely registered their bargaining choice. Such conduct, however, will be accorded less weight74 than that of either party to the election.75

_ATR Wire_ demonstrates the Sixth Circuit’s willingness to closely scrutinize the impact of union adherent conduct on the ultimate fairness of the election.76 While the Regional Director denied ATR Wire a hearing because it failed to establish an agency relationship between the Union and the proponents,77 the court’s remand indicates that this one factor is not solely determinative of whether the election should be set aside.

In _Zeiglers Refuse Collectors v. NLRB_,78 the Third Circuit enumerated several factors that the judiciary must consider in determining whether the actions of union partisans had a substantial impact upon the fairness of the election.79 These include the number and severity of threats, the reaction of those threatened, the number of employees affected, whether the threats were widely circulated, the proximity of the threats to the time of the election, and whether the threats were attributable to the union.80

Based upon the considerations set forth in _Zeiglers Refuse_, it appears that the Sixth Circuit correctly remanded _ATR Wire_ for an evidentiary hearing.81

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Several circuits disagree with the Board’s presumption that unofficial threats are less effective in creating an atmosphere of fear and reprisal. See, e.g., _NLRB v. Southern Paper Box Co._, 473 F.2d 208 (8th Cir. 1973); _Cross Banking Co. v. NLRB_, 453 F.2d 1346, 1347 (1st Cir. 1971).

7Zeiglers Refuse Collectors v. NLRB, 639 F.2d 1000, 1007 (3d Cir. 1981). The court noted that the Board should focus on determining whether a free election was impossible rather than on the affiliation of those who created such atmosphere. _Id._ at 1005.

71In its regulation of pre-election conduct the Board has presumed that statements made by or on behalf of unions have less impact than those made by the employer. See _Report No. 8_, _supra_ note 5, at 152-53.

For an analysis of the need for balancing the interests of the employer, the union, the Board and the employees with the constitutional right of free speech, see Wimberly & Steckel, _NLRB Campaign Laboratory Conditions Doctrine & Free Speech Revisited_, 32 _Mercer L. Rev._ 535 (1981).

In originally passing the Act, Congress deemed it unnecessary to afford employers protection against interference, coercion, and restraint by labor organizations and employees. Congress reasoned that such practice would contravene the essential purpose of the NLRA. See _S. Rep. No. 573_, 74th Cong., 1st Sess. 16 (1935).


7671 F.2d at 190.

7Id.

7639 F.2d 1000.

7Id. at 1005.

7 Compare _NLRB v. Eskimo Radiator Mfg. Co._, 688 F.2d 1315 (9th Cir. 1982) (No evidence that any employee was deterred from voting or voted against his personal choice due to conduct not attributable to the union); _NLRB v. S. Metal Serv., Inc._, 606 F.2d 512 (5th Cir. 1979) (Coerced employee stated that the remark had no effect on his vote).
Fifteen ATR Wire employees declared in sworn statements that they had been threatened with bodily harm or with disruption of the work routine. They testified that the general pre-election atmosphere was tense and that they were afraid to express support for the company. They further alleged that their personal property had been vandalized. The cumulative effect of this conduct may have indeed rendered a fair election impossible.

_Eliason Corp. v. NLRB_, decided by the Sixth Circuit seven months after _ATR Wire_, more explicitly defines the guidelines that the circuit should follow in evaluating the impact of union adherent conduct on the validity of election results. The court stated in relevant part:

[T]he threat on one worker's life, the threat to Mexican Americans as a group, the small size of the bargaining unit, and the large percentage of abstentions raise a substantial question of intimidation. This is particularly true when combined with Eliason's contention that the union adherent was active on behalf of the Union prior to the election. ...

_ATR Wire_, when compared with _Eliason_, may represent the outer limits of the Sixth Circuit's willingness to remand a case for an evidentiary hearing on objections questioning the fairness of an election. _Eliason_ seems to command a greater degree of severity, for example: death threats as opposed to property damage or bodily harm; a large number of abstentions as opposed to _ATR Wire_'s five; and seventeen eligible voters as opposed to 364 at the ATR Wire Kentucky plant.

_ATR Wire_, tempered by _Eliason_, establishes that the Sixth Circuit will grant an employer an evidentiary hearing when its workers may have been hampered in exercising their freedom of choice and when the employer might otherwise be compelled to bargain with a union not properly selected by his employees. Threats of bodily harm or property damage coupled with a large number of abstentions in a small bargaining unit, or employee affidavits alleging that the pre-election atmosphere was tense are standards guiding the Sixth Circuit in its determination of the fairness of representation elections.

IV. CONCLUSION

The Sixth Circuit, in _Tennessee Packers_, established a rigid policy of limiting the number of evidentiary hearings on post-election exceptions. It required a

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\[671 \text{ F.2d at 189.}\]

\[\text{Id.}\]

\[688 \text{ F.2d 22 (6th Cir. 1982).}\]

\[\text{Id. at 23. Although} \text{ Midland} \text{ expressly reaffirms the Board policy of reviewing coercive conduct, it might be fair to conclude that any campaign statement short of fraud might require more severe coercive conduct before it will set aside an election. Thus,} \text{ Eliason}, \text{ decided one month after} \text{ Midland}, \text{ appears to reflect the court's attempted compliance with the newly espoused} \text{ Midland} \text{ standard. See supra notes 68-71 and accompanying text. This may account for the Sixth Circuit demanding in} \text{ Eliason}, \text{ a showing of more egregious conduct before it infers that the employees were unable to exercise their free choice.}\]

\[\text{Id.}\]
party crying "foul" to specifically define its controversies and support its conclusions with evidence. The Tennessee Packers decision explained that delays in certifying election results must be zealously avoided so as to comply with the policy of the National Labor Relations Act.

Recent decisions of the Sixth Circuit, as exemplified by Prestolite Wire, North Electric, ATR Wire, and Eliason, represent an attempt to recognize the objecting party's due process rights. Thus, in all but narrowly defined circumstances the Board must either review all the evidence relied upon by the Regional Director or grant the objecting party an evidentiary hearing before it compels an employer to bargain.

These decisions also represent the circuit's attempt to more carefully guard the employee's right to exercise a free choice in representation elections. Thus, the court will remand for a hearing or review of the record when the pre-election conduct, even that of union advocates, may have tainted the results of the election.

Through these decisions, the Sixth Circuit has formulated consistent and reasonable guidelines concerning post-election objections. Only in adhering to these guidelines will the purposes of the National Labor Relations Act be served. Inconsistencies and complexities merely provide those seeking to avoid the results of elections numerous opportunities for protracted delays. "The utility of elections lies in final, definitive, and unchallenged results; elections become useless when the results are challenged, uncertain or rejected. Elections are intended to establish and stabilize representation, not leave it unsettled and in dispute."

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"Funke, Board Regulations of Pre-Election Conduct, 36 Tex. L. Rev. 893, 895 (1958).
"379 F.2d at 178. See supra text accompanying note 44.
"Id.
"Samoff, supra note 42, at 236-37.
"Id. at 228.