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## Regulating Union Representation Election Campaign Tactics: A Comparative Study of Private and Public Sector Approaches

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# Regulating Union Representation Election Campaign Tactics: A Comparative Study of Private and Public Sector Approaches

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## I. INTRODUCTION

Because the National Labor Relations Act,<sup>1</sup> which just observed its fiftieth anniversary, far predates the collective bargaining laws of the approximately forty states<sup>2</sup> authorizing public employee collective

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1. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (1982)).

2. Wisconsin was the first state to enact a public employee bargaining bill with approximately forty states following suit. See Ashmus & Bumpass, *Public Sector Bargaining in a Democracy — An Assessment of the Ohio Public Employee Collective Bargaining Law* 33 CLEV. ST. L. REV. 593, 595 (1984-85). This increase in

bargaining, it is not surprising that it has substantially influenced public employee labor law.<sup>3</sup> The National Labor Relations Board<sup>4</sup> and the federal courts have extensive experience in interpreting the NLRA, which experience can benefit the states. In addition, many state statutes governing public sector collective bargaining are modeled after the NLRA.<sup>5</sup> The use of the NLRA as a model provides an abundance of private sector precedent which can add much needed predictability to the regulation of public employee bargaining. This is especially important in those states which have only recently adopted comprehensive public employee bargaining statutes.

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the number of public employee collective bargaining laws is due in part to the rapid growth of the public sector itself. The number of state and local government employees has more than doubled in recent years—from 5,069,000 in 1956 to 14,316,000 in 1986. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS, Table B-2 (1986). The percentage of state and local government employees represented by unions was 43.1% in 1985. *Id.* Table 58.

3. Public employee labor law has traditionally been influenced by the private labor movement. Historically, the public employee movement began as a way to compete with private employees. For example: "Private sector employers had agreed to a ten hour work day in 1835, and ultimately public employers also acquiesced, not necessarily because they sanctioned union-type activity on the part of their employees, but rather because they . . . had to ensure the availability of their labor supply." *Project: Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A. L. REV. 887, 893 (1972).

In succeeding years, public employees had a secondary role in the labor movement.

Any benefits secured by these [public] employees generally resulted from the fact that the private sector labor union in their particular industry had already secured such benefits. Public employees benefited from the fact that public employers adopted the policy of making pay rates and labor standards conform to those prevailing in private employment in the surrounding area.

*Id.* at 894.

4. The National Labor Relations Board [hereinafter NLRB], is an adjudicative body heading the federal agency bearing the same name. Section 3(a) of the National Labor Relations Act, as amended, provides that the NLRB shall consist of five members "appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a) (1982).
5. Virtually all of the public sector collective bargaining statutes encompass to some extent the rights granted public employees. These statutes often parallel the statement of employee rights in section seven of the NLRA. For example, the Pennsylvania statute, PA. STAT. ANN. tit. 43 § 1101.401 (Purdon Supp. 1986), provides that:

It shall be lawful for public employees to organize, form, join or assist in employee organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employees shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.

R. SMITH, H. EDWARDS, R. CLARK, LABOR RELATIONS LAW IN THE PUBLIC SECTOR (1974).

Despite these strong reasons for following NLRA precedent in the public sector, the NLRA may not always provide the best model for regulating public sector labor relations<sup>6</sup> because the public and private sectors differ in many ways that affect labor relations.<sup>7</sup> Public employers have different packages of rights and duties than do private employers. Public employees, too, are different, enjoying constitutional protections unavailable to private sector employees.<sup>8</sup> These dif-

6. The possible inappropriateness of blind adoption of NLRA precedent has been pointed out by at least one commentator indicating that:

[S]tates may have adopted some statutory unfair labor practices without much or any evidence that they were needed. In a number of instances, it appears that the mere listing of unfair labor practices in the NLRA prompted states to include them in their own statutes. . . . An obvious example is the NLRA's prohibition against featherbedding. In practice the section has proved unenforceable and is now virtually a dead letter. The NLRA sections forbidding secondary pressures, excessive compulsory initiation fees and dues and certain kinds of organizational picketing have also been ineffective, yet some states have incorporated them in their statutes.

Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector: Has the National Labor Relations Act Been a Good Model?*, 38 STAN. L. REV. 1097, 1100-01 (1986) (citations omitted). Because of the differences between private and public sector employment it has been noted that public employees should receive different treatment from that afforded their private sector counterparts. *Developments in the Law — Public Employment*, 97 HARV. L. REV. 1611, 1616 (1983-84). "Whether the NLRA model is emulated or rejected, however, the pre-occupation with the private sector system is unfortunate. Simply to import the private sector bargaining regime into the public sector would be to neglect the special role of the public employer as representative of the public interest." *Id.* at 1681.

7. This difference is often noted in the statutory language employed by the states. For example, the Minnesota Public Employment Labor Relations Act notes that:

The relationships between the public, public employees, and employer governing bodies involve responsibilities to the public and a need for co-operation and employment protection which are different from those found in the private sector. The importance or necessity of some services to the public can create imbalances in the relative bargaining power between public employees and employers. As a result, unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary.

Minnesota Public Employment Labor Relations Act, MINN. STAT. ANN. § 179A.01 (West Supp. 1987).

8. In *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985), the Court held that due process protection for permanent state employees requires that tenured employees be provided pretermination notice and opportunity to respond as well as posttermination administrative review. *See also*, *Board of Regents v. Roth*, 408 U.S. 564, 573, 577 (1972) (recognizing property interest in public employment where "legitimate claim of entitlement" exists, and recognizing that discharge of a public employee might implicate a liberty interest). Public employees have also been recognized to have free speech rights, *see Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (letter critical of school board policies sent to newspaper by high school teacher) and constitutionally protected free association rights, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). These rights can often limit areas that would be subject to employer control in the private sector. *See, e.g.*, *East Hart-*

ferences may sometimes require states to modify the NLRA model. The peculiar needs of individual states may also necessitate modifications so that any one model may not serve each jurisdiction equally well.

In addition, private sector labor law under the NLRA has not always been predictable or stable and has been the subject of substantial criticism and debate in the past few years.<sup>9</sup> The law with regard to the effect of misrepresentation in the pre-election campaign, for example, has changed three times from 1977 to 1982.<sup>10</sup> In recent years, a number of other well-established precedents have also been overruled by the National Labor Relations Board.<sup>11</sup>

ford Educ. Ass'n v. Board of Educ., 562 F.2d 838 (2d Cir. 1977) (holding that teacher's first and fourteenth amendment academic freedom and liberty interests infringed upon by board of education dress code requiring male teachers to wear neckties).

Moreover, the NLRA grants private employees "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, and shall also have the right to refrain from any or all of such activities. . . ." 29 U.S.C. § 157 (1982). Absent the inclusion of these first amendment-like rights of free expression and freedom of association in the statute, they would not be available to private employees because private entities are not constrained by the first amendment. Public employees, however, are protected through the incorporation of first amendment protections by the fourteenth amendment. For a more detailed discussion see generally Ashmus and Bumpass, *Public Sector Bargaining in a Democracy—An Assessment of the Ohio Public Collective Bargaining Law*, 33 CLEV. ST. L. REV. 593 (1984-85). Additionally, the right to be free of threat of discharge in an employment-at-will situation has recently been made available to private sector employees not covered by collective bargaining agreements, while employees in the public sector have had civil service protection since the late nineteenth century. *Id.*

9. See generally, J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983). The debate can sometimes become quite heated. See Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984) and Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985).
10. See *infra* notes 128-48 and accompanying text.
11. See, e.g., *Rossmore House*, 269 N.L.R.B. 1176 (1984), *aff'd sub nom.* *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (overruling *PPG Indus., Inc.*, 251 N.L.R.B. 1146 (1980) and expanding employer's ability to interrogate union supporters); *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984) (overruling *Coronet Casuals*, 207 N.L.R.B. 304 (1973) and expanding types of strike misconduct justifying discharge); *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 N.L.R.B. 601 (1984), *aff'd sub. nom.* *UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985) (overruling *Los Angeles Marine Hardware Co.*, 235 N.L.R.B. 720 (1978), *enfd.*, 602 F.2d 1302 (9th Cir. 1979)); *Meyers Indus., Inc.*, 268 N.L.R.B. 483 (1984), *remanded sub. nom.* *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 313 (1985) (overruling *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975) and narrowing the concept of protected concerted activity); *Boeing Co.*, 230 N.L.R.B. 696 (1977), *enf. denied*, 581 F.2d 793 (9th Cir. 1978); *University of Chicago*, 210 N.L.R.B. 190

For these and other reasons, scholars and commentators have begun to question whether the private sector NLRA model is well-suited to all areas of public sector labor law.<sup>12</sup> The purpose of this Article is to address this question as it pertains to the public sector pre-election campaign.

If the NLRA model, as currently interpreted and applied, is adopted in the public sector, an employer will be allowed to campaign extensively on its premises without giving equal access or, indeed, any access, to union organizers.<sup>13</sup> The employer's speeches and other campaign messages will, however, be subject to reasonably intense scrutiny. Should the employer's campaign actions be deemed coercive, threatening or otherwise interfere with employees' free choice, a union election loss will be overturned and a new election held. Should the employer's actions be deemed so coercive that their impact is not likely to abate, a union which has achieved a majority by means of authorization cards can be recognized as the majority representative even though it has lost an election or no election has been held.<sup>14</sup> Union messages will also be subjected to similar scrutiny.<sup>15</sup> On the other hand, campaign messages that are inaccurate, even when intentionally inaccurate, will not be the basis for overturning elections.<sup>16</sup>

This Article will, for each of the above areas, describe the status of private sector labor law and examine some of the recent criticisms and suggestions for change. Decisions of state courts and agencies will then be reviewed to determine to what degree states have followed the private sector model in these areas and to what degree, if any, the states have taken into account any differences between the public and private sectors and the criticisms of the current status of private sector labor law. It is the view of the authors that while adoption of the NLRA model is generally appropriate, states have the duty and opportunity to determine whether all the basic assumptions of private sector labor law are applicable to the public sector. As states develop their own expertise, principles should be devised to protect employee free choice, while at the same time taking into account the particular needs of the public sector and the individual jurisdiction. Because the private sector model sets the standard, however, deviations should be clearly articulated and justified so that those attempting to apply the law in the future will have guidance from, and confidence in, the law.

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(1974), *enf. denied*, 514 F.2d 942 (7th Cir. 1975), (expanding employer's right to relocate work from unionized plant to nonunion plant).

12. See Aaron, *supra* note 6.

13. See NLRB v. United Steelworkers (Nutone and Avondale), 357 U.S. 357 (1958); James Hotel Co., 142 N.L.R.B. 761 (1963).

14. NLRB v. Gissel Packaging Co., 395 U.S. 575 (1969).

15. See *infra* notes 118-27 and accompanying text.

16. See Midland Nat'l Life Ins., 263 N.L.R.B. 127 (1982).

## II. UNION ORGANIZERS AND THE EMPLOYER'S PROPERTY

Whether private sector rules governing union access to employees and to the employer's property are appropriate in the public sector is an issue that is certain to be much debated. Even within the private sector there is controversy concerning the Supreme Court's adoption of separate rules for solicitation by employee and nonemployee union organizers.<sup>17</sup> While this dual analysis of access within the private sector is premised on traditional principles of property law, such principles are not uniformly applicable in the public sector. For this reason, the balance may be struck differently in the public sector to allow union organizers greater access to the workplace than is allowed in the private sector.

To understand the issue, it is important to note that even in the private sector courts have had difficulty distinguishing between constitutionally protected and unprotected property interests.<sup>18</sup> Even more complex definitional issues arise when comparing the rights of public and private property owners. Historically, private property interests included "an inherent liberty to make decisions concerning activities on or affecting the property without government interference."<sup>19</sup> These rights in private property, however, have not remained static. The Supreme Court in *Nebbia v. New York*<sup>20</sup> adopted the view that when private property becomes "clothed with a public [interest]," or used in a way that affects the public, it becomes subject to the state's police power.<sup>21</sup> The Supreme Court thus has recognized that the use made of private property may limit the rights of the landowner in relation to the needs of the state.<sup>22</sup>

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17. See generally Note, *Property Rights and Job Security: Workplace Solicitation by Non-employee Union Organizers*, 94 YALE L.J. 374 (1984) [hereinafter *Workplace Solicitation*]. (The Note examines the rationale underlying the doctrinal distinction between employee and nonemployee solicitation. The author argues that such a distinction allows a "trivial employer property claim to undermine employees' statutory right to advance their interests through self-organization.") *Id.*
  18. For example, the Supreme Court in *Pennsylvania Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) acknowledged that it has been unable to develop any "set formula" for determining when private property has been taken for public use, instead basing its determination on ad hoc, factual inquiries. *Id.* at 124. See generally Pattersen, *Property Rights in the Balance — The Burger Court and Constitutional Property*, 43 MD. L. REV. 518 (1984).
  19. W. SCOTT, *IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY*, 137-58 (1977).
  20. 291 U.S. 502 (1934).
  21. *Id.* at 534. The Court upheld state imposed price controls on milk. Additionally, the Court stated that the expectations that accompany private property that affects the public must encompass an expectation that the government may regulate the owner's use of that property. *Id.* at 539.
  22. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). The question of property use affecting the rights of private property owners also permeates Court decisions concerning intrusions by invitees. In *Pruneyard*, a property owner

In the area of labor law, the Court has held that an employer-property owner may not prohibit nondisruptive, pro-union activity by employees on the private employer's property. In *Republic Aviation Corp. v. NLRB*,<sup>23</sup> the Supreme Court held that employee solicitation of union membership and distribution of organizational literature is allowable in the workplace except when an employer can show that such activity tends to interfere with production, discipline or safety.<sup>24</sup> By opening the premises to employees, the employer-property owner subordinates certain property rights.<sup>25</sup> Thus, the Court has recognized the importance of allowing employee solicitation by union organizers at the workplace, even if the workplace is owned by a private employer. Employee solicitation is encompassed within the right of self-organization granted employees by section seven of the NLRA.<sup>26</sup>

While the importance of workplace solicitation in the private sector has been recognized, a distinction has been maintained between employee and nonemployee union solicitation. The property rights of the employer are granted deference in the latter situation.<sup>27</sup> Nonemployee union organizers have generally been denied access based on the 1956 case of *NLRB v. Babcock & Wilcox Co.*<sup>28</sup> In *Babcock & Wilcox*, the Supreme Court held that employers may deny access to non-employee union organizers seeking to contact employees on the

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claimed that a fifth amendment taking had occurred when a state law prohibited the owner of a large shopping center from excluding persons who were conducting orderly speech and petition activities. The Court rejected the owner's property interest stressing that the shopping center was open to the public. *Id.* at 83.

23. 324 U.S. 793 (1945).

24. See also *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (the Court upheld an agency order requiring the employer to allow employees to distribute a union newsletter in nonworking areas and on nonworking time); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978) (employees could engage in union activity in a hospital cafeteria, although it was used by visitors and patients, because any interference with cafeteria operators did not affect the primary functions of the hospital).

25. However, the property owner does retain a reasonable expectation of privacy in areas of his property outside the scope of the "invitation." Portions of the premises not open to employees are sometimes protected against intrusion. See *NLRB v. Visceglia*, 498 F.2d 43 (3d Cir. 1974) (employees assigned to one building do not have a right of access to separate building).

26. 29 U.S.C. § 157 (1982) provides that: "Employees shall have the right to self-organization, to form, join or assist labor organizations and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

27. Recognition of the private employer's property right to deny access for purposes of union solicitation turns on whether those engaging in solicitation possess section seven rights. Nonemployee union organizers do not possess section seven rights. See *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). "The locus [of the balance between employee rights of self-organization and employer property rights] . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights . . . asserted in any given context."

28. 351 U.S. 105 (1956).



employer's premises so long as "reasonable efforts by the union through other available channels of communication" will allow it to reach the employees with its message.<sup>29</sup> The union faces a "heavy burden" in showing alternative channels of communication are inadequate.<sup>30</sup> Thus, the employer's property interests have been held to outweigh any interest the employees may have in hearing the union organizer's message. Unions can be denied access to the employer's premises even where the employer uses its premises to give "captive audience" speeches in which it communicates its anti-union views to employees on working time.<sup>31</sup>

Critics of the current system have argued that the balance struck in *Babcock & Wilcox* ignores the importance of the workplace to employees,<sup>32</sup> and that nonemployee union organizers should be given direct access to employees on the employer's premises.<sup>33</sup> This, it is argued, would be a "much more effective way to permit unions to

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29. *Id.* at 112.

30. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978). Consequently, nonemployee union organizers are rarely granted access to private property to solicit union membership and distribute organizational literature.

31. See *infra* notes 112-17 and accompanying text for discussion of "captive audience" speeches. See also *James Hotel Co.*, 142 N.L.R.B. 761 (1963); *NLRB v. United Steelworkers (Nutone and Avondale)*, 357 U.S. 357 (1958).

32. It has been noted too, that this protection of employer property interests creates a near conclusive presumption against union access to employer property. Note, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 124 (1983). In *Babcock & Wilcox*, the Court stated that "[a]ccommodation between [§ 7 and property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. By holding that an employer may deny access where alternative means of communication exist, the Court did not establish a balancing test of accommodation but rather, established a presumption in favor of the employer and in support of employer property rights. See Note, *NLRB Orders Granting Unions Access to Company Property*, 68 CORNELL L. REV. 895 (1983) ("[A]lmost any degree of contact establishes the existence of alternative means of access." *Id.* at 902. The Court has found that the union does have "reasonable" alternative channels of communication available if there is any opportunity, however limited, for contact with employees. See *Sears*, 436 U.S. 180, 205 (1978). See also *Hudgens*, 424 U.S. 507 (1976). These forms of contact include home visits, correspondence and advertising campaigns. See Zimny, *Access of Union Organizers to "Private" Property*, 25 LAB. L.J. 618, 619 (1974). Because of these possible alternatives, access to private employer property is denied in all but exceptional cases. See *Huskey Oil v. NLRB*, 669 F.2d 643, 647-48 (10th Cir. 1982) (Board access order enforced at remote Alaskan worksite). In fact "the balance struck by the Board and the courts under the *Babcock & Wilcox* accommodation principle has rarely been in favor of trespassory organizational activity." *Sears*, 436 U.S. at 205. Hence the Court has jealously guarded employer property interests in the private sector by denying nonemployee union access, and by so doing has arguably restricted employee access to pro-union information on company premises.

33. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHIC. L. REV. 45, 70-72 (1986).

overcome whatever coercive advantage the employer obtains from its position" than is regulation of the coercive impact of employer speech.<sup>34</sup> This would permit unions to make an immediate response to employer threats rather than waiting for lengthy Board proceedings. Further, it is argued, "the very fact of union access would be an effective message to the employees that the law has the power to grant unions a significant role despite employer opposition. . . . [and] provide [t]he missing ingredient of free choice. . . ."<sup>35</sup>

These arguments favoring union access to employees in the workplace, which heretofore have been unsuccessful in the private sector, may be more persuasive in the public sector. Public employers do not have the significant private property interests protected in *Babcock & Wilcox*. Public employees are different from private employees, too, having recognized property interests and due process protections not provided employees in the private sector.<sup>36</sup> For these reasons, the balance may well be struck differently in the public sector to allow employees to hear the union message at the workplace without a showing by the union that alternative channels of communication are inadequate. Further, the mere availability of alternative forms of communication, which forms the basis of the *Babcock & Wilcox* decision, does not guarantee the effectiveness of such alternatives.<sup>37</sup> Thus, before blindly adopting the federal rule denying all access to nonemployee organizers, states should consider the issue in light of the importance of workplace access and the different property interests involved in public sector employment. There is some indication that at least a few state legislatures<sup>38</sup> and boards have begun to address this issue.

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34. *Id.* at 71.

35. *Id.*

36. See *supra* note 8 and accompanying text for discussion of protections not provided employees in the private sector.

37. This point was at issue in *May Dept. Stores Co.*, 136 N.L.R.B. 797 (1962), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963). The employer addressed employees on company property and company time while enforcing a broad rule against union solicitation. The Board granted union access to company property and found that alternative means of communication were inadequate in light of the fact that the employer's speech violated § 8(a)(1). The court of appeals reversed the Board's decision holding that the Board should only consider the existence of alternative forms of communication and not attempt to determine their adequacy. The court stated that "[t]he determination of whether or not the . . . [e]mployer[s] conduct produced an imbalance in opportunities for organizational communications is dependent upon the existence or nonexistence of alternative methods of communication open to the union." 316 F.2d at 799. See also *NLRB Orders*, *supra* note 32.

38. The Tennessee Education Professional Negotiations Act states that a board of education may not:

refuse to permit a professional employees' organization to have access at reasonable times to areas in which professional employees work, to use institutional bulletin boards, mailboxes, or other communication media, or to use institutional facilities at reasonable times for the purpose of meeting concerned with the exercise of the rights guaranteed by this

Critics of the current private sector system have argued for change. They argue that even where alternative channels of communication exist, union access to employees at the workplace is of paramount importance because a successful organizational campaign often depends upon the dissemination of information at the workplace.<sup>39</sup> Indeed, employer monopolization of the workplace is often critical to the employer's success in defeating unionization<sup>40</sup> because, under current law, the employer alone has the right to access and use of his property and owes no obligation to nonemployee organizers.

Although dealing with employee solicitation at the workplace,<sup>41</sup> at least one state board has specifically recognized that different prop-

[act]; provided, that if a representative has been selected or designated pursuant to the provisions of this [act], a board of education may deny such access and/or usage to any professional employees' organization other than the representative until such time as a lawful challenge to the majority status of the representative is sustained pursuant to this [act].

TENN. CODE. ANN. § 49-5-609(a)(4) (1978).

39. One commentator has noted that:

During the course of my study, I felt on several occasions that unions lost elections which they could have won but for campaign errors. The most common mistake was failure to convey personal interest in the employees. This mistake took several forms: over-reliance on formal campaign literature . . . and most significantly, not getting to know the rank-and-file members.

See Getman, *supra* note 33, at 60. The most effective way to combat these potential errors would be through personal contact with employees at the workplace. In this way the union organizer will have the opportunity to get to know the employees and attempt to address their particular needs and concerns. Routine campaign tactics and prepackaged messages, no matter how well-prepared, are often inadequate in accomplishing this task. *Id.* at 59-60.

40. J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976). The authors noted that:

The employer tends to be far more successful in attracting employees to meetings on working time and premises than does the union in attracting them to meetings outside working hours and away from company premises. Eighty-three percent of the sample attended company meetings, while only 36 percent attended union meetings. Furthermore, those employees who attended union meetings tended to be union supporters. The company, then, has a great advantage in communicating with the undecided and those not already committed to it. This advantage is particularly important since attendance at union meetings is significantly related to switching to the union.

*Id.* at 156-57. See also *Workplace Solicitation*, *supra* note 17.

41. See *supra* note 9 and accompanying text for discussion of employee union solicitation at the workplace. The states have generally followed the private sector rules concerning solicitation and distribution of union materials. For example, the Oregon Board in *Gresham Grade Teachers Ass'n v. Gresham Grade School Dist.*, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,685 (Or. Nov. 13, 1981) stated that:

In accord with federal precedent, an employer's rule regulating distribution of material in nonwork areas or on nonwork time is presumptively invalid unless special circumstances exist to make the rule necessary to maintain production or discipline. . . . While a rule prohibiting distribu-

erty interests are involved in public sector employment. In *Dade Teachers Ass'n v. School Bd. of Dade County*,<sup>42</sup> the applicable access rule prohibited employees from one job site from entering another job site for purposes of solicitation. Such a total ban was held to be presumptively invalid in light of the fact that:

[E]mployer interests in property rights did not justify the rule. A public employer has a significant management interest in restricting access to publicly owned property only to the extent necessary to accomplish the purpose for which the property was dedicated, and management interests in denying access to all nonemployees for such reasons as security is [sic] not necessarily sufficient to impede the significant interest of public employees in multi-site bargaining units to communicate with each other for organizational purposes.<sup>43</sup>

The issue of employer property interests in the public sector was also addressed by the Rhode Island State Labor Relations Board in a case deciding the question of access by union agents to public property. In *Rhode Island State Labor Relations Bd. v. City of Woonsocket*,<sup>44</sup> the

tion of material in working areas during working time is presumptively valid unless discriminatorily promulgated or enforced.

An across the board preclusion of all organizational activity during employee worktime was deemed an unfair labor practice as an overly broad restriction of employee rights in *Employees of South Park School Dist. v. South Park School Dist.*, [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 41,365 (Pa. Sept. 26, 1979). The Pennsylvania Board found that although a no-solicitation policy is presumptively valid when applied only to working time, this presumption fails once the ban extends to nonworking periods. Absent a compelling employer business interest, a blanket prohibition of all union activity can not stand.

Similarly, in Florida, the Public Employees Relation Commission held it unlawful for a public employer to prohibit solicitation by employees during the hours a college is in operation (excepting only the lunch period). *Okaloosa-Walton Higher Educ. Ass'n v. Okaloosa-Walton Jr. College Bd. of Trustees*, [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,020 (Fla. June 29, 1977). According to the Board, solicitation and distribution could only be limited to the nonworking hours of either the solicitor or the prospective member—not to the hours the college is in operation. In addition, only minor limitations would be permitted on the areas in which solicitation and distribution may take place.

In *University of Mich. v. Organizing Comm. for Clericals*, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,365 (Mich. April 16, 1981), a university employer guideline that banned the distribution of union materials by employees in nonworking areas and during nonworking times constituted unlawful interference. Any limitation of employee access must be: "(1) A valid no-solicitation/no-distribution rule limiting access solely to working areas or justified by business necessity, (2) that is officially promulgated and clearly disseminated to all employees, and (3) applies to all employees seeking access to the building for any purpose."

42. [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,574 (Fla. Sept. 22, 1981).

43. *Id.*

44. 3 Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 43,730 (R.I. July 18, 1984).

Board held that the city interfered with a union representation election by unlawfully denying union agents access to city property to place election flyers on city property and to visit employees. The Board reasoned that "while an employer had the right to regulate reasonable hours for union activity, it did not have the right to completely prohibit access of union members . . ."45 The Board held that the city had interfered with the exercise of a free and untrammelled election decision by denying union agents access to the property.

Similarly, in *American Fed'n of State, County, and Mun. Employees v. Coos County Comm'rs*,46 the New Hampshire Board granted the union a limited right of access to the employer's premises to insure that all the employees were aware of the union organizing drive. The union was denied access only to those areas that were not part of the employer's place of business or were not generally open to the public.47 With this ruling, the New Hampshire Board implicitly acknowledged the importance of workplace solicitation, while recognizing the more limited property interest of public employers.

This balance was recently examined by the Ohio State Employment Relations Board (SERB) in *Hamilton County Welfare Dept.*48 In 1983, management at the Hamilton County Department of Human Services began an organized campaign to oppose unionization. This campaign included use of a consulting firm that recommended a variety of improvements. Several of the "key" recommendations49 were incorporated into a March, 1984, document entitled "Employee Representation Philosophy."50 The Board noted this action by the employer to illustrate the significance the employer attached to workplace communication, and to "provide a backdrop against which the balance between the employer's solicitation/distribution policies applicable to the employee organization and the employer's own actions may be measured."51 The employer had a solicitation/distribution policy which stated that nonemployees may solicit and distribute information in the public parking lots, so long as there was no interference with people coming to or leaving work. Nonemployees were not al-

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45. *Id.*

46. 3 Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 43,920 (N.H. May 9, 1984).

47. In *Coos*, the chapel of a county nursing home was not required to be open to union organizers as it was not part of the employer's place of business and not generally open to the public.

48. 3 Ohio Pub. Employee Rep. 3036 (May 12, 1986).

49. The purpose of such recommendations was the creation of an environment in which the employees "would not desire a union." This included suggestions that "things were going to get better" and that working conditions would improve. *Id.* at VII-58.

50. *Id.* The "Employee Representation Philosophy" dealt with a variety of changes in personnel policy and employee benefits.

51. *Id.*

lowed access to department working and nonworking areas for any purpose because of the need to maintain client confidentiality.<sup>52</sup> Employees were allowed to solicit only during nonworking time. The employer recommended that such solicitation occur in nonwork areas to avoid interruptions of those on working time.<sup>53</sup>

In contrast to these access restrictions, the employer's labor relations advisors were given essentially unrestricted access to the employer's premises. In addition:

[T]hey discussed the employer's campaign [against union representation] with supervisors on the supervisor's working time. Supervisors distributed employer literature to employees during working hours in working areas. Employees were encouraged to ask questions "at your convenience" about the employer's election position. Thus the S/D [solicitation/distribution] policy was not applied to those conducting the employer's campaign against representation.<sup>54</sup>

This lack of evenhandedness prompted SERB to set forth several access principles to insure fairness in access during the ordered re-election campaign. The Board noted that the standard for fairness could be found in *Babcock & Wilcox*. The Board chose not to emphasize the question of available alternate channels of communication, but rather highlighted that *Babcock & Wilcox* prohibits employers from discriminating against a union by allowing other distributions on employer premises.<sup>55</sup> The Board stated that for nonemployees seeking access to the interior of the premises, the employer was to be given twenty-four

52. The nonemployee rule reads in full:

Persons not employed by the Hamilton County Welfare Department and off-duty Welfare Department staff may solicit or distribute for any lawful purpose on public parking lots so long as there is no interference with persons coming to and leaving work. Nonemployees are not permitted access to department working and nonworking areas for any purpose to ensure continued client confidentiality and the uninterrupted delivery of agency services. Former employees and spouses and children of current employees may be granted access to specified work or nonwork areas with prior approval or [sic] Personnel Services.

53. The employee rule reads in pertinent part:

Employees of the Hamilton County Welfare Department may solicit for any lawful purpose during nonworking time. It is recommended that any solicitation occur in nonwork areas to avoid interruptions to staff who remain on working time. Employees are not permitted to solicit, conduct personal business, or distribute printed matter or goods for any purpose during working time of the employee soliciting or the employee being solicited. Employees are not permitted to distribute printed matter for any purpose in work areas.

54. *Id.* at VII-59.

55. *Id.* at VII-60, n.32. The NLRB would reach the same result on this issue. *See, e.g., Midwest Regional Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977) *enforcing* 222 N.L.R.B. 161 (1976) (holding invalid distribution of procompany literature while banning pro-union literature).

hour notice of a visit.<sup>56</sup> In addition, all solicitation and distribution was to be confined to nonwork areas and during nonwork times.<sup>57</sup> Nonemployees were to be allowed access to parking lots without advance notice to the employer. With regard to employee-solicitors, solicitation and distribution activity was to be allowed in both work and nonwork areas so long as both employees are on nonworking time. Finally, as a general rule, the employer was allowed to regulate any activity which disrupted or interfered with normal work on the employer's premises.<sup>58</sup>

Thus, a number of states seem to agree with Professor Getman and others that unions should have access to employees at the workplace. Whether these decisions are based on perceived differences between public and private property or on a general rejection of the balance struck in *Babcock & Wilcox* is not yet clear. It remains for future decisions to fully explain the rationale and limits of these new doctrines.

### III. REGULATING EMPLOYER CAMPAIGN SPEECH AND TACTICS

The degree to which a governmental agency should regulate employer speech and tactics in an organizational campaign is another issue which the states may choose to examine independently of the NLRA model. While private sector law is somewhat settled, observers have raised substantial questions about its foundation and efficacy.

The NLRB plays a substantial role in regulating private sector employer speech in the pre-election campaign. Under Section 8(a)(1),<sup>59</sup> employer speech or acts which the NLRB believes to have coerced or restrained employees in the exercise of protected rights may be grounds to order an election that was lost by the union to be rerun. In exceptional cases in which the Board finds unfair labor practices serious enough to prevent a fair rerun of the election, it can order the employer to bargain with the union despite the union's failure to win the election.<sup>60</sup>

The content of pre-election speech is carefully scrutinized by the Board. For example, employer predictions as to the consequences of unionization must be "carefully phrased on the basis of objective fact

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56. This notice must be accompanied by a list of persons and alternates intending access and a designated time.

57. The employer must designate at least two, but no more than five, nonwork areas for such activity.

58. The Ohio SERB has now taken steps to apply the *Hamilton County* access principles to all representation elections. See SERB Proposed Rule Revisions § 4117-5-06 (proposed Nov. 26, 1986).

59. 29 U.S.C. § 158(a)(1) (1982). The section provides it is an unfair labor practice for an employer: "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7."

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

to convey an employer's belief as to demonstrably probable consequences beyond his control."<sup>61</sup> Even where employer speech is not considered an unfair labor practice because it does not constitute a "threat of reprisal or force or promise of benefit,"<sup>62</sup> such speech may still provide the basis for overturning an election result if it upsets the "laboratory conditions" under which an election is ideally to be held.<sup>63</sup>

In recent years, two empirical studies have generated substantial debate over the role of NLRB regulation of employer practices before an election.<sup>64</sup> These studies suggest that unfair labor practices by the employer have little, if any, impact on employees. In *Union Representation Elections: Law and Reality*,<sup>65</sup> the authors argue that the Board has played too active a role in policing campaign conduct. They found that employees begin an election campaign with firm opinions and that over eighty percent do not change these opinions throughout the campaign.<sup>66</sup> Further, they argue that employees often do not pay much attention to the campaign and that even threats and reprisals have little impact.<sup>67</sup>

It is unclear whether these criticisms have affected the public sector because the state courts and boards have not been consistent in their assessment of public employer pre-election campaign tactics. In most instances the state courts and boards have patterned their regulations governing public employers pre-election campaign tactics on the NLRA model.<sup>68</sup> Occasionally the state courts and boards have not

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61. *Id.* at 618.

62. 29 U.S.C. § 158(c) (1982).

63. *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

64. See J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 38, and Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision*, 79 NW. U.L. REV. 87 (1984).

65. See J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 38.

66. *Id.* at 72-73.

67. *Id.* at 96-97. Others have disagreed and argued that it has not been proven that there is no connection between employer coercion and employee votes and that, indeed, there is an "inherent plausibility of the notion that employees will respond to threats to the jobs that are crucial to their lives . . ." Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1783-84 (1983). See also, Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181 (1976); Kochan, *Legal Nonsense, Empirical Examination and Policy Evaluation*, 29 STAN. L. REV. 1115 (1976). But see, Goldberg, Getman & Brett, *Union Representation Elections — Law and Reality: The Authors Respond to the Critics*, 79 MICH. L. REV. 564 (1981).

68. For a discussion of the convergence theory which argues that the private sector and public sector are on parallel lines of development see Troy, *The Convergence of Public and Private Industrial Relations Systems in the United States*, 5 GOV'T UNION REV. 37 (1984). According to this theory, a system of rules will evolve for public sector labor relations which will mirror those set out by the NLRB. But see, Felker, *Convergence As a Theory of Public Sector Labor Phenomenon: A Cri-*



emulated the federal rules applicable to private sector pre-election campaign tactics, but have instead encouraged less restrictive standards for the public sector parties. The rationales for such decisions, however, have not always been clearly explained.

### A. Employer Threats

An area that has been the subject of criticism in the private sector is the law concerning employer threats, a subject involving both unfair labor practice issues and laboratory conditions issues. One of the most difficult issues in employer speech cases is ascertaining the true nature of the employer's comments. An employer's freedom to express its opinion in representation cases is guaranteed by the first amendment and by section 8(c) of the NLRA.<sup>69</sup> However, the employer's opinions cannot be coercive in nature. Section 8(c) of the NLRA provides:

The expressing of any views, argument or opinion, or dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this Act if such expression contains no threat of reprisal or force or promise of benefit.<sup>70</sup>

Since the passage of section 8(c), the Board has attempted to balance the employer's free speech rights with the employee's right to exercise his or her section seven rights.<sup>71</sup> The most difficult problem that arises when determining whether an employer's statements constitute a threat is distinguishing threats from predictions.<sup>72</sup> However, some commentators claim that "union supporters are not coerced by threats of reprisal" and that this should not be a "basis for setting aside an

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*tique*, 15 J. COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR 107 (1986) (Author contends that the differences between public sector and private sector labor relations are more meaningful than the similarities).

69. In *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), the Supreme Court held that employers have a constitutional right to express their opinions as long as the statements are not coercive in nature. An employer's freedom to express noncoercive statements is also sanctioned by 29 U.S.C. § 158(c) (1982).
70. 29 U.S.C. § 158(c) (1982).
71. A number of commentators have dealt with this issue. See Barksdale, *Employer Speech During Union Organizational Campaigns*, 46 MISS. L.J. 401 (1975); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Christensen, *Free Speech Propaganda and the National Labor Relations Act*, 38 N.Y.U. L. REV. 213 (1963); Field, *Representation Elections Films and Free Speech*, 25 LAB. L.J. 217 (1974); Fields, *Free Speech Under the Taft-Hartley Act*, 11 LAB. L.J. 603 (1977); Hudson & Werther, *Section 8(c) and Free Speech*, 28 LAB. L.J. 608 (1977); Koretz, *Employer Interference With Union Organization Versus Free Speech*, 29 GEO. WASH. L. REV. 339 (1960); Pokempner, *Employer Free Speech Under the National Labor Relations Act*, 25 MD. L. REV. 111 (1965).
72. See C. MORRIS, *THE DEVELOPING LABOR LAW*, 82-86 (1983). The Supreme Court reviewed this problem in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

election or for finding an unfair labor practice. . . ."<sup>73</sup>

Like the private sector, the public sector has had substantial experience with employers' pre-election threats of reprisal. The decisions of state labor boards and courts indicate that states are concerned with the effect that these pre-election campaign tactics have on public sector employees' freedom of choice. These decisions, however, do not always make clear to what extent the private sector model is being applied or limited. In some cases, it is apparent that the public agency is unaware of the private model.

The majority of state board and court decisions have held that a public employer unlawfully discourages employees from voting for a union in a representation election when the employer makes threats of reprisal against the workers. The most common threats made by a public employer are that the employees will lose either their jobs (out-right or by subcontracting the work) or benefits if a union is elected.

For example, in *Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 53 v. Gallatin County Comm'rs*,<sup>74</sup> the Montana Board of Personnel Appeals found that the employer committed an unfair labor practice when it made statements claiming possible job, vacation and benefit losses, and the contracting out of major work if the union won.<sup>75</sup> The Board concluded that these statements had the

73. J. GETMAN, J. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY*, 147 (1976). Some states have neglected to enact a provision comparable to section 8(c) of the NLRA in their public employment relations acts. See MICH. COMP. LAWS ANN. § 423 (West 1978 & Supp. 1986); OHIO REV. CODE ANN. § 4117 (Baldwin 1983). However, the Michigan Employment Relations Commission has permitted an employer to express opposition to unionization despite the absence of any provision comparable to section 8(c) of the NLRA in the Michigan Public Employment Relations Act. See *Lapeer County General Hosp. v. Service Employees Int'l Union, Local 79* [1979-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 41,721 (Mich. April 11, 1980). The Commission concluded that since the "PERA was drafted in 1965 after several decades of private sector labor relations during which employers exercised freedom of speech . . ." and "[that] it could not be easily asserted that the legislature intended to move public sector labor relations back to an era 'which few, if any of the legislators had experienced . . . based on a statutory interpretation which had long ago been judicially neglected and then legislatively erased.' " *Id.* While the Ohio State Employment Relations Board has not gone as far as the Michigan Employment Relations Commission, it has given some indication that it is receptive to similarly interpreting the Ohio Public Employee Collective Bargaining law. See *Stark County Engineer v. American Fed'n of State, County and Mun. Employees, Council 8*, 2 Ohio Pub. Employee Rep. 2333 (April 4, 1985) (SERB dismissed an unfair labor practice charge against a union since there was no "evidence that the union engaged in a restricting or coercive manner" when it distributed false campaign leaflets). See generally Ashmus and Bumpass, *supra* note 8, at 626.

74. [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,823 (Mont. Oct. 13, 1977).

75. *Id.*

effect of "interfering with or coercing the employees in the exercise of their rights."<sup>76</sup> In *Bridgton Fed'n of Public Employees v. Hamil*,<sup>77</sup> statements by town officials that if the union won, the current benefits would be reduced to "ground zero" and renegotiated, and that certain work would be subcontracted out,<sup>78</sup> prompted the Maine Labor Relations Board to set aside the election. Such statements interfered with the laboratory conditions necessary for a free and fair election. While similar conclusions have been reached by the state labor boards in Florida,<sup>79</sup> New York,<sup>80</sup> Pennsylvania,<sup>81</sup> and Washington,<sup>82</sup> the state

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76. *Id.*

77. [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,825 (Me. March 3, 1982). *See also*, Council No. 74, American Fed'n of State, City and Mun. Employees v. Maine School Admin. Dist. No. 1, [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 41,696 (Me. Feb. 29, 1980) (Employer's letter to voters which stated that "in a collective bargaining situation everything, including the benefits you now have are negotiable . . ." was considered to be a threat which interfered with the laboratory conditions of the election. A new election was ordered.); Teamsters Local No. 48, State, County, Mun. and Univ. Employees v. City of Waterville, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,192 (Me. Oct. 31, 1980) (Employer's sudden requirement that employees work the day before Christmas was contrary to its past practice and could be viewed as an implied threat that conditions would be more difficult if a union was voted in.); and Teamsters Local No. 48, State, County, Mun. and Univ. Employees v. Town of Oakland, [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,775 (Me. Aug. 24, 1978) (Employer committed a prohibited practice when it suspended fringe benefits during the organizational campaign).

78. *Bridgton Fed'n of Pub. Employees v. Hamil*, [1980-1983 Transfer Binder] (CCH) (Pub. Bargaining Cas.) 42,825 (Me. March 3, 1982).

79. Laborers' Int'l Union, Local 666 v. Jes Parrish Memorial Hosp., [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,182 (Fla. Dec. 12, 1977) (A supervisor unlawfully advised employees that they would lose benefits or sick leave if the union prevailed.); *but see* Local 218, Textile Processors, Service Trades, Health Care Professional and Technical Employees Int'l Union v. Gadsden County Bd. of County Comm'rs, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,562 (Fla. Nov. 12, 1981) (An employer's projection that if a "union won a representation election county voters might reject a proposed bond issue necessary for the continued funding. . ." of the employer, did not necessitate setting aside the election since the threatened action was not in the control of the employer.); South Florida Am. Fed'n of State, County and Mun. Employees v. City of North Miami, [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,753 (Fla. Nov. 16, 1978) (An employer's pre-election campaign statements which claimed that all present employee benefits would become subject to collective bargaining were not so coercive in nature to warrant setting aside the election).

80. Catskill Regional Off-Track Betting Corp. v. Local 32-E Serv. Employees Int'l Union, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) , 42,843 (N.Y. Mar. 11, 1982) (An employer threatened employees with loss of benefits if the union won).

81. Northeastern Educ. Intermediate Unit, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 41,894 (Pa. June 5, 1980) (The

labor boards of Illinois<sup>83</sup> and Missouri<sup>84</sup> have not always been as accommodating of employees' rights.

A few state courts have also addressed whether an employer's statements constituted threats of reprisal. The Iowa Supreme Court, in *Mount Pleasant School Dist. v. PERB*,<sup>85</sup> stated that an employer's pre-election notice which claimed that staff reductions were an "occasional but real fact of life in the school business when our enrollment is declining"<sup>86</sup> was not an implied threat of job elimination since it was something outside of the employer's control. In a case heard by the Wisconsin Supreme Court, an employer was ordered to recognize the employees' exclusive representative after the court found that the city's acts constituted prohibited practices.<sup>87</sup> The court affirmed the Wisconsin Employment Relations Commission's findings that the employer's assertions that it would subcontract out work and discontinue fringe benefits if the union won were coercive threats.<sup>88</sup> The Minnesota Court of Appeals affirmed a Minnesota Bureau of Mediation Services order for a new election in *Swift County — Benson Hospital v. BMS*.<sup>89</sup> Though the employer's practices were not referred to as threats, the state board and court agreed that the employer interfered with employees' free choice by initiating layoffs, reducing hours, and increasing work loads prior to a representation election.<sup>90</sup>

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state board set aside an election where the employer representative predicted that reprisals such as loss of benefits, reduced wage increases, and stricter enforcement of work rules would result if the union was voted in as the employees' representative. The state board concluded that the employees were unsophisticated and susceptible to the employer's threats).

82. *Wellpinit Classified Pub. Employees Ass'n/WEA v. Wellpinit School Dist.*, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 43,357 (Wash. June 22, 1982) (Representation election was set aside when the employer made threatening statements that employees might lose their jobs if the union won and that they would not get anything more by joining a union).
83. *American Fed'n of State, County and Mun. Employees v. Illinois Dep't of Commerce and Community Affairs*, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 41,849 (Ill. April 14, 1980) (The Office decided that the employer's decision to subcontract work did not discourage any of the employees from voting for the union since none of the employees were in the affected department).
84. *Service Employees Int'l Union, Local 96 v. Hickman Mills School Dist.*, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,455 (Mo. Jan. 7, 1981).
85. *Mount Pleasant School Dist. v. Pub. Employees Relations Bd.*, 343 N.W.2d 472 (Iowa 1984).
86. *Id.* at 475.
87. *Wisconsin Employees Relations Comm'n v. City of Evansville*, 69 Wis. 2d 140, 230 N.W.2d 688 (1975).
88. *Id.* The employer also promised future benefits if the employees would reject the union.
89. 358 N.W.2d 458 (Minn. 1984).
90. *Id.*

Finally, one state board not only reached a result inconsistent with the NLRA, but reached this result by a method long discredited by the NLRB. In *Service Employees Int'l Union, Local 96, v. Hickman Hills School Dist.*, the state board of Missouri refused to set aside an election despite the fact that the employer's supervisors told employees that the employer would look into subcontracting work if the union won the election.<sup>91</sup> The Missouri State Board of Mediation based its holding upon testimony by the employees claiming the statements about subcontracting work did not intimidate them.<sup>92</sup> Employee testimony as to the effect of a speech has long been discounted in the private sector. As the NLRB stated in its 1948 decision in *G.H. Hess, Inc.*,<sup>93</sup>

[t]he determination of whether statements are coercive does not depend on whether they have had the intended effect, or upon the subjective state of mind of the hearer. . . . the test of interference, restraint, and coercion under section 8(a)(1) of the Act does not turn upon the success or failure of the attempted coercion; rather the applicable test is whether the Employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of the employee rights under the Act.<sup>94</sup>

In summary, the available state board and court decisions indicate that though some states have applied less restrictive standards than the NLRB's in regulating speech of a threatening nature, the majority of states still view the public employees as being in need of protection from employer speech which might "interfere with, restrain or coerce" them in their right to choose or reject union representation. Cases such as *Hickman Hills* demonstrate the need for state labor relation boards to become familiar with the NLRA to at least consider the validity of evidence before giving it weight.

## B. Employer Promises and Grants of Benefits

With regard to promises and grants of benefits, the most prominent private sector case is *NLRB v. Exchange Parts Co.*,<sup>95</sup> in which the Supreme Court held that an employer violates the law by expanding employee benefits during a campaign. Such an expansion, the Court

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91. *Service Employees Int'l Union, Local 96, v. Hickman Mills School Dist.* [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,455 (Mo. Jan. 7, 1981).

92. *Id.* One wonders, however, if the testimony can be considered reliable. An intimidated employee is likely to remain intimidated while testifying at a public hearing in the presence of the employer.

93. 82 N.L.R.B. 463 (1949).

94. *Id.* at 463-64, n.3. The Board has consistently adhered to this principle. See *Masonic Homes of Cal., Inc.*, 258 N.L.R.B. 41 (1981); *Beird-Poulan Div.*, 247 N.L.R.B. 1365 (1980); *Aladdin Hotel*, 229 N.L.R.B. 499 (1977); *International Ladies Garment Workers' Union*, 214 N.L.R.B. 706 (1974).

95. 375 U.S. 405 (1964).

held, constituted a "fist inside the velvet glove"<sup>96</sup> and thus, a threat, because employees are "not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."<sup>97</sup> In essence, the rationale is to presume coercion from conduct that is not facially coercive.

In a recent article,<sup>98</sup> Jackson and Heller criticize the *Exchange Parts* rule and argue that it has been so broadly applied that all promises and grants, even those that have no affect on an election, are "indiscriminately equated with compulsive unfair labor practices."<sup>99</sup> They argue that the *Exchange Parts* presumption that all promises and grants of benefits are coercive should be eliminated.<sup>100</sup> In their view, a representation election should be set aside, or an unfair labor practice found, only when a grant or promise of benefit is found to have provably coerced employees. Benefit grants and promises would be considered lawful until proven otherwise. The authors argue that the current rules encourage vast amounts of time consuming litigation before the results of a representation election can be determined. They claim, too, that the *Exchange Parts* rule promotes and encourages "promise-fudging and campaign gamesmanship," and that promises and grants are not "bribes" but rather "workplace economic choices."<sup>101</sup> They argue employees should be free to consider these economic promises in making their choice to vote for or against the union, and that the *Exchange Parts* rule elevates "the unionization objective over those of economic improvement and free choice. . . ."<sup>102</sup> The *Exchange Parts* rule, it is claimed, is not consistent with the national labor policy of neutrality, and discourages the granting of benefits that may improve an employee's standard of living.

An employer's grant or promise of benefits prior to a representation election has also been scrutinized by a number of state boards. The state board decisions appear to be consistent with the NLRB's view that in the absence of a legitimate business reason, or established past practice, an employer's conferral or promise of benefits prior to a representation election is inherently coercive. For example, in *Clovis Unified Teachers Ass'n v. Clovis Unified School Dist.*,<sup>103</sup> the California Public Employee Relations Board set aside a representation elec-

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96. *Id.* at 409.

97. *Id.*

98. Jackson & Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1 (1982).

99. *Id.* at 5.

100. *Id.*

101. *Id.* at 57.

102. *Id.* at 53.

103. 3 Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 43,800 (Cal. July 2, 1984).

tion when the employer granted the final Saturday of the school year as a nonwork day. Since the employer's action was not in accord with any pre-existing plan or past practice, the PERB held that the conferral of a benefit prior to a representation election to be unlawful.<sup>104</sup> The Florida Public Employees Relations Commission also appears to agree in principle with the "fist inside the velvet glove" theory. In *Hillsborough County Police Benevolent Ass'n v. City of Temple Terrace*,<sup>105</sup> a representation election was set aside after the employer announced a wage increase seven days prior to the election. The Commission noted that a wage increase granted prior to an election, which is not in accord with any past practice, could be perceived to be the result of an impending election.<sup>106</sup> However, the Florida Public Employees Relations Commission recognized in *Laborer's Int'l Union of North America Local 1101 v. School Bd. of Alachua*,<sup>107</sup> that the theory has limits. The conferral of a *de minimis* benefit, such as allowing employees to take materials from the employer's scrap pile, was unlikely to have influenced the employees in their votes, and therefore did not warrant setting aside a representation election.

Where the conferral of a benefit is a customary practice, it is unlikely that the employees will perceive the benefit as an attempt by the employer to influence votes. In such situations, the representation elections are not set aside merely because the conferral of the benefit was close in time to the election.<sup>108</sup> In one instance, the failure to

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104. *Id.* The employer's continuation of a two percent pay raise was not an unlawful grant of a benefit since that was part of a pre-existing plan.

105. [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,139 (Fla. Dec. 16, 1980).

106. *Id.* See also *Passaic Valley Sewerage Comm'n v. IBEW*, [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,135 (N.J. Oct. 1, 1980) (The employer granted the employees a larger increase in salary than was originally adopted in a previous plan. Since the employer could not show that the new salary plan was motivated by purposes other than the upcoming representation election the commission set aside the election.); *Lucas County Bd. of Mental Retardation and Developmental Disabilities Educ. Ass'n v. Lucas County Bd. of Mental Retardation and Developmental Disabilities*, Case No. 85-UR-02-2996 (Ohio SERB, Sept. 25, 1986) (The board found that the employer committed an unfair labor practice when it granted a wage increase and other benefits to employees during a representation campaign. The board noted that though there are exceptions to the general rule that no wage increase or other benefit should be granted during a representation election campaign, none of the exceptions were applicable to the employer's case.)

107. 3 Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 44,189 (Fla. Aug. 22, 1984).

108. *Matter of Am. Fed'n of State, County and Mun. Employees*, Wis. Council 40, [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,780 (Wis. Sept. 26, 1978) (A wage increase granted to employees two days before a union filed a representation election petition did not warrant setting aside the election since it had been the customary practice of the public employer to grant equivalent wage increases at approximately the same time each year).

grant a customary wage increase during the pendency of a representation election was deemed to unlawfully interfere with the employees' organizational rights. In *Hudson Valley Community College v. Hudson Valley Community College Non-Teaching Professional Org.*,<sup>109</sup> it was customary for the college to grant merit based increases to its nonteaching staff every September first. The employer's failure to grant the annual raise to the employees covered by the petition "conveyed the coercive message that unionization could be costly to employees. . . ."<sup>110</sup> Finally, one state has found that in some instances an employer may confer benefits before a representation election if the employer can show that it would be impractical to require the working conditions to remain fixed from the time a pre-election campaign is instituted.<sup>111</sup>

### C. "Captive Audience" Meetings

In the private sector, an employer may compel employees on paid time, to attend an anti-union presentation on company premises. These presentations are commonly referred to as "captive audience" speeches. The NLRB limited this practice in *Peerless Plywood*,<sup>112</sup> by holding that private employers and unions are prohibited from delivering captive audience speeches to groups of employees during the twenty-four hours before an election. The *Peerless Plywood* rule has received a mixed reception by the state labor boards, and one state

109. 3 Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 44,224 (N.Y. Aug. 13, 1985).

110. *Id.*

111. *Polk County Police Benevolent Ass'n v. City of Lake Alfred*, [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,186 (Fla. Nov. 18, 1977) (An employer lawfully provided its employees with a camera for the department's use nine days prior to a representation election).

112. 107 N.L.R.B. 427 (1953). A "captive audience" speech is an employer campaign tactic in which employees are compelled to attend, on paid time, an anti-union speech or presentation by the employer. While the NLRB has, for almost forty years, upheld the right of an employer to give captive audience speeches, the issue has not always been without controversy. In 1946, the NLRB held that compelling employees to listen to anti-union speeches on company time violated the Act because it was necessary to protect employees against the employer's use of its inherent economic power. *Matter of Clark Bros. Co., Inc.* 70 N.L.R.B. 802 (1946) *enforced* 163 F.2d 373 (2d Cir. 1947). The Board reversed its field and held captive audience speeches legal in 1948. *Babcock & Wilcox*, 77 N.L.R.B. 577 (1948).

In 1951, the Board changed its view and held that while a captive audience speech was not in and of itself illegal, the giving of such a speech carried with it a duty to allow the union an equal opportunity to respond under equivalent conditions. *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951) *enf. denied*, 197 F.2d 640 (2d Cir. 1951), *cert. denied*, 343 U.S. 905 (1953). Finally, in 1953, the Board ruled in *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953), that an employer does not act illegally by making a captive audience speech and denying the union's request for an equal opportunity to reply.



labor board has rejected the notion that an employer has any right to conduct captive audience speeches. At the other extreme the Florida Public Employees Relations Commission has expressly authorized captive audience speeches and has further refused to adopt even the twenty-four hour limitation rule in *Peerless Plywood*.<sup>113</sup> Adopting a compromise position in *Clovis Unified Teachers Ass'n v. Clovis Unified School Dist.*,<sup>114</sup> the California Public Employment Relations Board stated that the timing of a captive audience meeting is but one factor to be considered in ascertaining whether the employees' votes were influenced by the employer's conduct.<sup>115</sup>

The Ohio State Employment Relations Board has entirely rejected the concept of captive audience speeches. In three different instances, the board has found captive audience activity to be a *per se* violation of the Ohio Act.<sup>116</sup> The Ohio Board has also made reference to the differences between public and private sector captive audience speeches noting, "[t]here are conceivable constitutional arguments against public sector captive audiences which do not apply to private sector employers. At least it is arguable that a public sector employer's compelled audience meets the state action element requisite to a claim of violation of the 14th Amendment."<sup>117</sup> The Board did not, however,

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113. The Florida Public Employees Relations Commission has held that an employer did not act unlawfully by holding a captive audience meeting within 24 hours of an election. The commission stated that it "will cure any pre-election abuses of the free speech privilege through investigation of the circumstances, substance and quality of the particular speech itself rather than through an outright prohibition of speech during the 24 hour period preceding an election. . . ." District Council No. 66 Int'l Bhd. of Painters and Allied Trades v. Putnam County School Bd., [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,856 (Fla. March 24, 1978).
114. 3 Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 43,800 (Cal. July 2, 1984).
115. *Id.* See also *Williamsport Area Community College v. Pennsylvania Labor Relations Bd.*, [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,542 (Pa. Oct. 7, 1977) (An employer did not engage in unlawful campaign conduct since the employer merely stated that it expected, rather than ordered, employees to be present at employer-employee meetings).
116. *Hamilton County Welfare Dept.*, 3 Ohio Pub. Employee Rep. 3036 (May 12, 1986) (Captive audience meeting was a "fatal flaw" which deprived the employees of a "free and untrammelled" election environment); *Ohio Council 8, American Fed'n of State, County and Mun. Employees*, 2 Ohio Pub. Employee Rep. 2632 (June 5, 1985) (Captive audience speech required setting aside election results and conducting new election); *Ohio Council 8, American Fed'n of State, County and Mun. Employees*, 2 Ohio Pub. Employee Rep. 2652 (Sept. 19, 1985) (Board stated that though the employer has first amendment rights, these rights must be balanced against the listener's first amendment rights). There is some precedent in early NLRB decisions for the Ohio SERB's position, see note 112 *supra*.
117. *Hamilton County Welfare Dept.*, 3 Ohio Pub. Employee Rep. 3036, n.5 (May 12, 1986).

further identify the nature of the constitutional argument it envisioned.

#### IV. REGULATING UNION CAMPAIGN TACTICS

Related to the above issues, but presenting additional issues of its own, is the question of to what degree an agency should regulate the campaign tactics of a union. In *NLRB v. Savair Manufacturing Co.*,<sup>118</sup> the Supreme Court held that pre-election solicitation of memberships by the union coupled with a promise to waive the union's initiation fee "allows the union to buy endorsements and paint a false portrait of employee support during its election campaign."<sup>119</sup> Thus, the Court upheld the invalidation of a union election victory, partly on the rationale that the Act must be neutral in honoring the rights of those opposing the union as well as those supporting it. The case and its holding have been described by Professor Getman as demonstrating one of the "foolish restrictions on union campaign tactics."<sup>120</sup> First, it is argued that the regulated practice has little effect on election outcome and, second, that overturning a union victory is a more serious matter than is overturning an employer victory.<sup>121</sup> Overturning a union victory denies representation to employees who voted for the union, whereas overturning a union loss and ordering a second election allows the company to continue to operate "free of the union - the same result as the election would have provided - until a new election is held . . ."<sup>122</sup> Thus, if the *Savair* rule was designed merely to assure even-handed treatment of unions and employers, Professor Getman argues that it fails to achieve its designed purpose.<sup>123</sup>

In the public sector, at least three states have addressed the issue of union campaign tactics; none, however, have addressed the full range of issues presented by *Savair* and its critics. In *Amalgamated Transit Union*,<sup>124</sup> the Washington Public Employees' Relations Commission held that it was not unlawful for a union to provide an attorney for employees the union was seeking to represent. The employees' petition for an election had caused the need for legal representation to prevent their dismissal. The union, therefore, had a legitimate interest in conferring such benefits.

Similarly, in *Hillsborough County Police Benevolent Ass'n, Inc. v.*

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118. 414 U.S. 270 (1974).

119. *Id.* at 277.

120. See Getman, *supra* note 33, at 69.

121. *Id.* at 70.

122. *Id.*

123. *Id.*

124. 3 Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 43,835 (Wash. Nov. 16, 1983).

*City of Winter Haven*,<sup>125</sup> the Florida Public Employees Relations Commission held that statements by union officials concerning the benefits provided exclusively to members of the union did not improperly influence the results of a representation election. The Commission found that there was no indication that the benefits were conditioned upon employee support for the union in the election. The benefits were "an inducement to join the union, not an inducement to vote for the union in the election."<sup>126</sup> And finally, in *American Fed'n of State, County and Mun. Employees v. Public Employee Relations Comm.*,<sup>127</sup> the Public Employment Relations Commission of New Jersey found that the dispensing of alcoholic beverages to potential voters was not considered a reward for voting for the union.

## V. REGULATING MISREPRESENTATION

Whether an election may be overturned because of substantial misrepresentation of fact is an issue that affects both unions and employers. It also presents an example of the difficulties found in following NLRB precedent in a changing political world. The Board held in its 1962 *Hollywood Ceramics Co.*<sup>128</sup> opinion that elections should be set aside where there is an intentional or unintentional misrepresentation involving a substantial departure from the truth that occurs at a time preventing an effective reply, and which might "reasonably be expected to have a significant impact on the election."<sup>129</sup> This position was reversed in 1977 in *Shopping Kart Food Mkt., Inc.*<sup>130</sup> The Board, relying in part on the Getman, Goldberg and Herman study,<sup>131</sup> stated that it would no longer review the truth or falsity of campaign propaganda, but would, rather, rely on employees to discount such propaganda. Less than two years later, in *General Knit of California*,<sup>132</sup> the Board overruled *Shopping Kart* and returned to the standards of *Hollywood Ceramics*. Most recently, the Board, in *Midland National Life Insurance*,<sup>133</sup> overruled *General Knit* and returned to the rule of *Shopping Kart*. In deciding that it will no longer set elections aside based on misleading campaign statements, the Board stressed the value of "definite, predictable and speedy results"<sup>134</sup> and the abilities of employees as "mature individuals who are capable of recognizing

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125. [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,647 (Fla. Feb. 24, 1981).

126. *Id.*

127. 114 N.J. Super. 463, 277 A.2d 231 (1971).

128. 140 N.L.R.B. 221 (1962).

129. *Id.* at 224.

130. 228 N.L.R.B. 1311 (1977).

131. J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 73.

132. 239 N.L.R.B. 619 (1978).

133. 263 N.L.R.B. 127 (1982).

134. *Id.* at 132.

campaign propaganda for what it is and discounting it."<sup>135</sup>

The public sector has also had to contend with misrepresentations made by employers and unions in pre-election campaigns. There have been various responses by the states to the employer's use of this pre-election campaign tactic. To date at least one state labor board has expressly adopted the standards enunciated by the NLRB in *Shopping Kart*, while two other states have adhered to the *Hollywood Ceramics* rule. A few states have reviewed situations involving possible misrepresentations by employers and have refrained from explicitly adopting either rule.<sup>136</sup>

In 1980, the Vermont Labor Relations Board purported to adopt the *Shopping Kart* rule in *International Union of Operating Engineers Local 98 v. Town of Springfield*.<sup>137</sup> The board decided that it would not set aside a second representation election in a situation where the employer distributed a question and answer sheet to employees which contained the employer's views, arguments and opinions.<sup>138</sup> The board stated that though it would intervene in a situation where the employer's method of misrepresentation was such that the employees could not recognize that the material was campaign propaganda, it would not otherwise analyze campaign propaganda for its truth or falsity.<sup>139</sup>

In other jurisdictions, employer misrepresentations have been scrutinized according to the former private sector rule of *Hollywood Ceramics*. In *Oregon State Employees Ass'n v. Department of Com-*

135. *Id.*

136. Council No. 74, American Fed'n of State, County and Mun. Employees v. Bangor Water Dist., [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 42,205 (Me. Dec. 22, 1980) (Misrepresentations made by an employer that projected that employees "would lose contact with management because they would have to go through the union steward . . .", that employees would have to pay excessive initiation fees and be subject to fines for nonattendance, and that employees would be "required to contribute to or work in behalf of a political candidate . . ." were false. Since the union was still successful in the election a bargaining order was instituted rather than a new election); Missouri Fed'n of Teachers, St. Charles Unit v. School Dist. of St. Charles, [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 41,845 (Mo. March 20, 1980) (The Missouri State Board of Mediation decided not to set aside an election where the employer's pre-election statements made in a letter mailed to employees stated that "employee problems would no longer be confidential and that unionization would require increased employee supervision. . . ." The board held that the statements were not inaccurate or untrue. In addition, the board stated that statements made at an employer's meeting three days prior to the election were not improper since "the union had three days . . . to respond to any misrepresentation.")

137. [1980-1983 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 41,893 (Vt. June 5, 1980).

138. *Id.* This suggests that, in its willingness to review some misrepresentations, Vermont has not adopted the entire *Shopping Kart* rule.

139. *Id.*

merce,<sup>140</sup> the Oregon Employment Relations Board reaffirmed its approval of the recently abolished *Hollywood Ceramics* rule. The Oregon Board refused to set aside an election for alleged misrepresentation by the employer. The Board stated that the union had sufficient time to refute any misrepresentations made by the employer.<sup>141</sup> Likewise, in *Mount Pleasant School Dist. v. PERB*,<sup>142</sup> the Iowa Supreme Court reiterated Iowa's adherence to the *Hollywood Ceramics* rule. In this case, the union complained of a notice posted by the employer some thirty hours before the election. The notice stated, among other things, that "[g]ood faith bargaining (includes rejecting) a demand we feel in any way would put the school district in a bad position" and that "bargaining starts with a bare table" and that "a collective bargaining agreement cannot guarantee against staff reduction . . ."<sup>143</sup> The Iowa Public Employee Relations Board hearing officer concluded that these statements did not violate rules 5.4(3)(b) of the Iowa Administrative Code<sup>144</sup> because the statements in the notice did not "contain any substantial misrepresentations of fact or law . . ."<sup>145</sup> However, the hearing officer decided that the statements in the notice were perceived by the employees as a veiled threat. The full Public Employee Relations Board agreed with the hearing officer and set aside the election based upon the veiled threat. The District Court of Iowa reversed the Public Employee Relations Board's decision to invalidate the election but it affirmed PERB's conclusion under rule 5.4(3)(b) with regard to the misrepresentations.<sup>146</sup> The Iowa Supreme Court affirmed the district court.<sup>147</sup> While the Iowa Supreme Court noted that in *Midland Nat'l Life Ins. Co.* the NLRB had recently returned to the misrepresentation tests set out in *Shopping Kart*, it did not discuss this because the holding was that the notice did not violate rule 5.4(3)(b).<sup>148</sup>

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140. [1977-1980 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) 40,662 (Or. Dec. 1, 1977).

141. *Id.*

142. 343 N.W.2d 472 (Iowa 1984).

143. *Id.* 474-75.

144. The rule reads:

5.4(3) *Objectionable conduct during election campaigns.* The following types of activity, if conducted during the period beginning with the filing of an election petition with the board and ending at the conclusion of the election, and if determined by the board that such activity could have affected the results of the election, shall be considered to be objectionable conduct sufficient to invalidate the results of an election: . . .

b. Misstatements of material facts by any party to the election or their representative without sufficient time for the adversely affected party to adequately respond.

145. 343 N.W.2d at 476.

146. *Id.*

147. *Id.* at 485.

148. *Id.* at 480.

Thus, the status of campaign misrepresentations as a means to overturn a representation election is as unclear in many states as it has been in the private sector. What this suggests is that a state, even when it adopts private sector precedent, ought do so in a reasoned opinion which provides a rationale for future application. To merely adopt the private sector model may be to provide little guidance for the future in an area where private sector law is subject to frequent change.

## VI. CONCLUSION

The greatest developments in public sector labor law appear yet to come. The NLRA remains, as it should, the primary model for adjudication in states' regulation of pre-election campaign conduct. Despite the arguments of those who suggest that campaigns are too heavily regulated and that employees' votes are rarely affected by campaign tactics, the states seem most often to be at least as committed as the NLRB to reviewing pre-election campaigns carefully to insure that employees are not threatened, coerced, or otherwise restrained in exercising their free choice.

This substantial uniformity may be a recognition that the NLRA model is still appropriate and that, in the view of most states, the critics are wrong. On the other hand, it may well be that the states have not yet given full consideration to all the critics' arguments. A number of issues have not been clearly raised or discussed. Most state decisions, too, do not specifically address the issue of whether differences between public and private sector employers and employees may require modification of private sector practices.

Recent cases such as those granting nonunion employee organizers access to the workplace indicate that, in this area, some states are willing to reject the private sector model. Whether such decisions reflect agreement with critics of how the NLRA has been interpreted or are based on differences between public and private property is not yet clear. If the state boards and, ultimately, state courts will further articulate and explain these decisions, they may become persuasive precedent in other jurisdictions. Ultimately, they may also affect the interpretation of private sector labor law as well.

In summary, this is a formative period in public sector labor law. Private sector labor law under the NLRA, which provides the model and guide for most public sector labor law, is undergoing a re-examination. The states can participate in this re-examination, and in some cases, may find a better way to serve the interests of employees and employers. When they do, it is hoped that their published decisions will explain: (1) why the NLRA model was accepted, rejected or modified; (2) how the NLRA model was modified or rejected and the limits of such modification or rejection; and (3) the rationale and guiding

principles behind such rejection or modification. Because rejection or modification of typically accepted NLRA principles will leave parties temporarily adrift, and the system in need of predictable guidelines, such clear explanations will be necessary. Further, such explanations will help those of us in other jurisdictions, in both the public and private sectors, in our continued search for a more perfect system.