1985

Campaign Misrepresentations Since Midland National Life: A Survey and Appraisal

Douglas M. Lieberman

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation

Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol3/iss1/4

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
CAMPAIGN MISREPRESENTATIONS SINCE MIDLAND NATIONAL LIFE: A SURVEY AND APPRAISAL

I. INTRODUCTION

Approximately three years ago, the National Labor Relations Board ("NLRB" or "the Board") developed its present method of analyzing campaign misrepresentations made by a party to a Board conducted election. The current standard, formulated in Midland National Life Insurance Company, generally states that the Board will look at the manner in which the misrepresentation was made, rather than at its substance. This reverses a standard in effect for fifteen years, and is a return to that set forth in Shopping Kart Food Market Inc.

Since Midland, sixteen Board decisions and fourteen appellate court decisions have dealt with the application of the standard. After a brief history of campaign misrepresentations and a closer look at Midland itself, this Note will discuss post-Midland decisions, focusing on the decision of the adjudicating body, its relationship to the intentions expressed in Midland and the possible future effect of Midland.

II. HISTORY

From the outset, when assessing the validity of a union representation election, the Board did not look to the campaign propaganda's truth or falsity, but only to coercive conduct that may have affected the employee's choice. The Board members at that time believed that employees were capable of recognizing the propaganda for being just that, and that the employees would discount it.

In 1947, the Taft-Hartley amendments to the Wagner Act

gave employers the right to free speech so long as the “expression contains no threat of reprisal or force or promise of benefit.”

Even after the enactment of the amendments, the Board continued to make decisions based on the belief that employees themselves would dispel propaganda and refused to probe the veracity of those statements during the campaign.

The Board set forth its “laboratory conditions” standard for representation elections in General Shoe Corp. The majority believed that the Board should not analyze elections in the same manner as they did unfair labor practices. Voters need to be able to make a “free and untrammeled choice” for the election process to work as envisioned by legislators. “In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.”

Subsequently, the Board carved an exception to its rule of not analyzing the truth or falsity of campaign propaganda. In United Aircraft Corp., employees were so deceived as to be unable to evaluate a fake telegram as propaganda. Therefore, the election was set aside. However in the absence of deceptive practices, employees were assumed to be able to recognize propaganda “for what it is, and discount it.”

The Gummed Products Co. was the first case deeming the substance of campaign propaganda important in analyzing campaign misrepresentations. The Board set aside that election because the union deliberately misrepresented the wage rates it had negotiated. The Board decided to set aside elections when the propaganda was so misleading as to prevent the employees from exercising their free choice in selecting a bargaining representative.

The Board restated this standard in the landmark case of

10. Id. at 126, 21 L.R.R.M. (BNA) at 1341.
11. Id. at 126, 21 L.R.R.M. (BNA) at 1340.
12. Id. at 127, 21 L.R.R.M. (BNA) at 1341.
14. Id. at 105 n.9, 31 L.R.R.M. (BNA) at 1438 n.9.
16. Id. at 1093-94, 36 L.R.R.M. (BNA) at 1157.
Campaign Misrepresentations

Hollywood Ceramics Co.\(^{17}\) The Board noted that when dealing with factual misrepresentations, the trier of fact must balance the employees’ right to free choice with their right to free speech.\(^{18}\) The Board formulated various balancing tests, and deemed it necessary to choose only one.\(^{19}\) An election would only be set aside when something was said or done which was a “substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.”\(^{20}\) Even if the misrepresentation was substantial, the Board could choose not to set aside the election if the circumstances showed the misrepresentation did not substantially affect the election.\(^{21}\)

The Board followed the Hollywood Ceramics doctrine for fifteen years until Shopping Kart Food Market Inc.,\(^{22}\) in which the Board overruled Hollywood Ceramics by deciding that it would not “probe into the truth or falsity of the parties’ campaign statements.”\(^{23}\) The majority’s underlying premise was that employees are mature individuals and should not be protected when they are capable of protecting themselves.\(^{24}\) The Board planned to continue to intervene in cases where a party improperly involved the Board and its processes, as well as those in which a party used forged documents to

\(^{17}\) Hollywood Ceramics Co., 140 N.L.R.B. 221, 51 L.R.R.M. (BNA) 1600 (1962). Fanning was the only Board member to decide both Hollywood Ceramics and Midland.

\(^{18}\) Id. at 224, 51 L.R.R.M. (BNA) at 1601.

\(^{19}\) Id.

\(^{20}\) Id. It has been noted, however, that restrictions on campaign propaganda content which require truthful and accurate statements “resist every effort at clear formulation and tend inexorably to give rise to vague and inconsistent rulings which baffle the parties and provoke litigation.” Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 92 (1964). The Board intended to alleviate such “vague and inconsistent rulings” by overruling Hollywood Ceramics in Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 94 L.R.R.M. (BNA) 1705 (1977).


\(^{23}\) Shopping Kart at 1311, 94 L.R.R.M. (BNA) at 1705.

\(^{24}\) Id. at 1311, 94 L.R.R.M. (BNA) at 1707.
make it impossible for employees to recognize the propaganda as propaganda.26 The new standard permitted an inquiry into the manner in which the misrepresentation was made and not the substance of the misrepresentation.26

Less than two years later the Board overruled Shopping Kart in General Knit of California27 and reverted to the Hollywood Ceramics standard. The General Knit majority observed that the Shopping Kart view on analyzing misrepresentations was "inconsistent with [the Board's] responsibility to insure fair elections."28 Hollywood Ceramics did in fact recognize that employees were adults and were able to discern propaganda, but the rule was designed to protect employees from "overzealous campaigners."29 There are certain circumstances when even the most sophisticated employees will not recognize a statement as propaganda, and thus their free choice will not be affected.30 Hollywood Ceramics "preserved the integrity of [the Board's] electoral process" and assured employees of their section 7 rights.31 In addition, the standard was a deterrent to conduct interfering with free elections, and was a more effective deterrent than the rule in Shopping Kart.32 The General Knit majority rejected as flawed the empirical evidence33 on which the Board had relied in

---

27. General Knit, 239 N.L.R.B. 619, 99 L.R.R.M. (BNA) 1687 (1978). (Truesdale, filling the vacancy caused by Walther's departure, joined Fanning and Jenkins in the majority. Penello and Murphy dissented.) For a discussion of General Knit see Truesdale, From General Shoe to General Knit: A Return to Hollywood Ceramics, 30 LABOR L.J. 67 (1979) (criticisms of Hollywood Ceramics were unfounded); Comment, The National Labor Relations Board and Pre-Election Misrepresentations: From General Shoe to General Knit, 1979 S. ILL. U. L.J. 475 (1979) (Hollywood Ceramics better protects the policies of the NLRA than does Shopping Kart); Note, The Hollywood Ceramics-Shopping Kart Merry-Go-Round: Where Will it Stop?, 20 SANTA CLARA L. REV. 157 (1980) (neither the Hollywood Ceramics nor the Shopping Kart standard should be used to analyze misrepresentations; a compromise standard based on the factors which influenced those employees who were determined by the Getman & Goldberg study, infra note 33, to be affected by election campaigns should be used).
29. Id.
30. Id. at 620, 99 L.R.R.M. (BNA) at 1689.
31. Id.
32. Id.
33. The Board relied on Getman & Goldberg, The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation, 28 STAN. L. REV. 263 (1976), which explained the methodology and some of the preliminary findings of their study. The complete findings were published in GETMAN, GOLDBERG & HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976). The study set out to determine whether election campaigns actually affect the way employees vote. The authors found that most employees voted as they had intended to before the election campaigning started.
Shopping Kart,^{34} and concluded that it should not be incorporated in
the new standard's formulation.^{35}

III. MIDLAND NATIONAL LIFE INSURANCE COMPANY

In 1982, the Board decided to return to the standard set out in
Shopping Kart, and overruled General Knit and Hollywood Ceram-
ics in Midland National Life Insurance Company.^{36} The essential
issue was to determine the best means to insure that employees
would be able to make a fair and free choice when choosing their
bargaining representatives.^{37} The new rule had to be consistent with
the democratic process involved in an election, but did not have to
absolutely guarantee that it would reflect the choice of the majority
of the employees.^{38} The rule in Midland, according to the Board, is
consistent with the process.^{39}

34. The study was conducted using thirty-one elections, all of which were held in the
same part of the country. The General Knit majority believed that the sample was not large
enough. The study also should have focused on the percentage of employees that were affected
during its conclusions. Id. at 622, 99 L.R.R.M. (BNA) at 1690. For a proposed standard
focusing on the affected employees, see Note, The Hollywood Ceramics-Shopping Kart Merry-
Go-Round supra note 27, at 183. For a critical analysis of the study, see, e.g., Four Perspec-
tives on "Union Representation Elections: Law and Reality," 28 STAN. L. REV. 1161 (1976);
Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,
96 HARV. L. REV. 1769, 1781-86 (1983); but see Goldberg, Getman & Brett, Union Representa-
tion Elections Law and Reality: The Authors Respond to the Critics, 79 MICH. L. REV. 564


and Members Zimmerman and Hunter comprised the majority. Dissenting were Members
Fanning and Jenkins.) The composition of the Board is a major factor in determining the
standard used for campaign misrepresentations. First Fanning in Hollywood Ceramics, and
then Jenkins, joining him in Shopping Kart, believed that analyzing the substance of the mis-
representations was important. When they were able to find someone to agree with them, i.e.
Truesdale, this was the standard used. See General Knit, Inc., 239 N.L.R.B. 619, 99
L.R.R.M. (BNA) 1687 (1978). However, the effect of the composition of an administrative
agency on the rules of that agency at any particular time is an outgrowth of administrative
agencies themselves. See Bieman, Reflections on the Problem of Labor Board Instability, 62
DEN. L. REV. 551 (1985). For a discussion of Midland, see Allen, The Demise of the
Hollywood Ceramics Doctrine (Again), 9 EMP. REL. L.J. 580 (1984). (Midland should result in
a more stable policy and change in campaign strategies); Comment, A Look at the Revolving
NLRB Policies Governing Union Representation Election Campaigns, 19 WAKE FOREST L.
REV. 417 (1983) (a better rule would be to keep the Midland standard with an exception for
misrepresentations involving wages and benefits); The NLRB Will No Longer Inquire into the
Truth or Falsity of Representations Made During Election Campaigns, 13 CUM. L. REV. 687
(1983) (Board composition is the determinative factor with respect to which standard will
apply).

37. Midland, 263 N.L.R.B. at 130, 110 L.R.R.M. (BNA) at 1492.

38. NLRB v. A.J. Tower Co., 329 U.S. 324, 332-33 (1946), cited in Midland at 131,
110 L.R.R.M. (BNA) at 1492.

39. Midland at 131, 110 L.R.R.M. (BNA) at 1492. The Board viewed a return to
The *Shopping Kart* majority found the *Hollywood Ceramics* "substantial departure from the truth" standard\(^{40}\) to be too subjective, and therefore concluded that the standard did not fulfill its stated goal of assuring employee free choice.\(^{41}\) The *Shopping Kart* standard, on the other hand, which looks to the manner of election campaigning clearly indicates what conduct is acceptable. When enacted, it was believed that the standard would lead to quick litigation and harmony between the Board and the Courts.\(^{42}\) The *Hollywood Ceramics* standard is more protectionist than that established in *Midland*\(^{43}\) which presumes that employees are capable of recognizing propaganda for what it is.\(^{44}\) The *Midland/Shopping Kart* rule lends itself to definite, predictable results, which the *Hollywood Ceramics* standard does not.\(^{45}\)

Application of the *Midland* standard does not result in elections set aside on the basis of misleading campaign statements.\(^{46}\) The Board does, however, analyze those elections in which forged documents are used, rendering the voters unable to recognize propaganda as propaganda.\(^{47}\) Elections are set aside when an "official Board document has been altered" to suggest that the Board is endorsing a

---

*Shopping Kart* as alleviating the problems associated with employing the *Hollywood Ceramics* standard, "insur[ing] the certainty and finality of election results," as well as minimizing frivolous claims regarding those results. *Midland* at 131, 110 L.R.R.M. (BNA) at 1492. Some of the problems associated with *Hollywood Ceramics* were vagueness and inconsistency. *Shopping Kart* at 1312-13, 94 L.R.R.M. (BNA) at 1707. After *General Knit*, Member Truesdale argued that the Board balanced factors relating to other sections of the NLRA; therefore, it could balance those relating to campaign misrepresentations as well. Also, inconsistent decisions were based on the effect of a particular misrepresentation, not of the standard itself. Truesdale, *supra* note 27, at 71.

40. See *supra* text accompanying notes 17-21.

41. The problems encountered in the use of the standard include "extensive analysis of campaign propaganda, restriction of free speech, variance in application as between the Board and the courts, increasing litigation and a resulting decrease in the finality of election results." *Shopping Kart*, 228 N.L.R.B. at 1312, 94 L.R.R.M. (BNA) at 1706.

42. Although the courts have not totally abandoned the *Midland* standard, they have not thoroughly embraced it either. See *supra* text accompanying notes 88-119.


44. *Id.*

45. *Id.* at 132, 110 L.R.R.M. (BNA) at 1492-93. *Midland* is said to lead to definite results because it limits what cases the Board could consider. However, some courts have a problem accepting such a "definiteness." See *supra* text accompanying notes 88-119.


47. *Id.* A "forgery" exists when the "making" of the object is bad, not when it includes falsities. Gilbert v. United States, 370 U.S. 650, 656-58 (1962). The object itself, not its content, is examined. State Bank of Poplar Bluff v. Maryland Gas. Co., 289 F.2d 544, 548 (8th Cir. 1961). Generally, a forgery is a false making, with an intent to defraud, of a document that is not what it purports to be, which is not the same as a document containing a term known to be false. United States v. Price, 655 F.2d 958, 960 (9th Cir. 1981).
party to the election. Other conduct, including threats and promises, which interferes with employee free choice continues to be prohibited under this standard. The new standard is to be applied "to all pending cases in whatever stage."

Former members Fanning and Jenkins, who served during Shopping Kart and General Knit, dissented, following their voting patterns in the previous cases. One contention of the dissenters was that the majority misread the prior case history. The dissent contended that the standard set forth in Hollywood Ceramics was in line with the basic policy of assuring employee free choice. It did not conflict with the attitude which prevailed prior to Gummed Products because at that time propaganda was analyzed whenever it had so lowered the standards of campaigning as to make it impossible to state whether the uninhibited desires of the employees could be determined in an election. The dissenters also believed that the Board should not summarily decide that voters would be unable to recognize certain types of propaganda but that the decision ought to be made according to guidelines which could be applied on a case-by-case basis.

The dissent revealed a problem with the new standard. Because it allows fraudulent misrepresentations but not forgeries, it is still possible for a party to defraud the employees by fraudulent statements. No action would be taken, however, unless the fraud were the result of a forgery. The distinction between fraud and forgery allows

48. *Midland* at 133 n.25, 110 L.R.R.M. (BNA) at 1494 n.25. This policy led the Board to change its treatment of mischaracterizations of Board actions. The Board now considers these misstatements in the same way as general campaign misrepresentations. See Riveredge Hosp., 264 N.L.R.B. 1094, 111 L.R.R.M. (BNA) 1425 (1982). Details of this application of *Midland* are beyond the scope of this Note; see generally Note, Mischaracterizations of the Board and its Processes: The Aftermath of *Midland* and Riveredge, 1 HOFSTRA LAB. L.F. 281 (1983).

49. *Midland* at 133, 110 L.R.R.M. (BNA) at 1494. This may cause problems in the future for the Board, which is now able to determine selectively in which cases they will analyze the substance of the misrepresentation by deeming it "coercive." See Mead Nursing Home, Inc., 265 N.L.R.B. 1115, 112 L.R.R.M. (BNA) 1019 (1982); supra text accompanying notes 90-96. This also allows an "escape hatch" for a future Board that may not want to overrule *Midland* given the past wavering Board policy. The statements can be analyzed as coercive, keeping *Midland* intact but rendering it meaningless.

50. *Midland* at 133 n.24, 110 L.R.R.M. (BNA) at 1494 n.24. This statement has led to problems. See supra text accompanying notes 108-122.

51. Member Fanning was on the Board when *Hollywood Ceramics* was decided.

52. *Midland* at 133-34, 110 L.R.R.M. (BNA) at 1494-95 (Fanning and Jenkins, Mem., dissenting).

53. Id. at 133-34, 110 L.R.R.M. (BNA) at 1494.

54. Id. at 133 n.28, 110 L.R.R.M. (BNA) at 1494 n.28.

55. Id. at 134, 110 L.R.R.M. (BNA) at 1495.
the employee’s free choice to be distorted, inhibited, and frustrated in favor of a party’s freedom to engage in lies, trickery, and fraud.  

It should be noted that distinction also compromises the ideal of “laboratory conditions” for the election, which was not Midland’s intent. Although an employee is deemed incapable of recognizing forgeries as propaganda, he is considered to be capable of evaluating frauds taking place around him, and of disregarding them as campaign propaganda. This is true no matter the manner or substance of the fraud.

In addition, it would seem that the Midland standard will affect the parties after the election. A party may be selected as a bargaining representative based on misrepresentations he used during the election process that are not forgeries, but would cause the election to be set aside under Hollywood Ceramics. The method used to win the election may cause the company to be wary of the bargaining representative when it comes time to bargain. Such wariness would impede the bargaining process and hurt the employees in the end.

A better policy would be to avoid a “hard and fast” rule in regard to the issue of campaign misrepresentations. Such a rule summarily disposes of everything not labeled a forgery on the basis that employees are able to recognize and assess the misrepresentation. The case-by-case approach set out in Hollywood Ceramics and General Knit allowed the Board to set aside elections for substantial misrepresentations, whether forged or not. That method better protected section 7 rights because it is broader than the new standard. The finality of election decisions and the time-savings espoused in Midland do not outweigh the importance of protecting an employee’s section 7 rights. Though it may take more time to choose a bargaining representative by the case-by-case approach, the majority’s true choice will not be obscured by the misrepresentations put forth during the election process.

The Midland rule may be viewed as a way to alleviate the problem of Board composition. This, however, is not the case. Although the standard to assess what constitutes a forgery is more rigid than

57. This is also related to a theory called “election by bombshell.” Truesdale, supra note 27, at 70. Under this theory each side waits until the end of the campaign to use the “worst” lies and frauds because they will have the greatest impact at that time.
58. See Truesdale, supra note 27, at 71.
59. If the Board is to rely on empirical evidence at all, a study to determine whether employees can actually discern propaganda should be conducted.
60. See supra note 36.
that of a substantial misrepresentation, it is still possible for the Board to change the standard, as it has in the past, or use other methods to circumvent it.61

The underlying premise of Midland regarding the ability of employees to assess the truth of campaign statements may be applied in other areas.62 Such application would be a violation of section 7 and may lead to an abandonment of the idea of majority rule. The result of allowing employees to assess everything presented to them during an election campaign would make elections free-for-alls, leading to a reversion to the past evils the Board had tried to overcome.63 It would also eliminate the Board’s presence from election campaigns, which may be too drastic a step,64 and lead to the risk that unions and employers would soon be making totally erroneous and outlandish statements. The result would be that the employees would base their decisions on erroneous statements instead of what actually took place. The majority’s choice, if it were bottomed on the truth, would be different from one based on falsehoods and coercion.

The Board’s reversal of General Knit may have been too broad.65 In Midland the Board was no longer concerned with insuring that the election process met the “laboratory conditions” and allowed the employees to discern propaganda for themselves. Originally,66 this was done because the Board relied on the findings of the Getman-Goldberg study.67 However, due to the study’s shortcomings,68 a better approach would have been to leave Hollywood Ceramics intact until more research was done in the area. It is possible that the Getman-Goldberg findings are applicable in certain, but not all, situations. Applying Midland to all situations, when the data itself may only apply in certain situations, overextends the study’s

61. See supra text accompanying note 49. In a paper written to help employers in their actions during campaign elections, it was suggested that they act as if Hollywood Ceramics was still in force since it could not be determined what the Board would do in the future. Panken & Spellman, Future Shock and the National Labor Relations Board, in LABOR AND EMPLOYMENT LAW, Vol. II (2d ed. 1984).
62. See NLRB v. Harrison Steel Castings Co., 728 F.2d 831, 841 (7th Cir. 1984) (Coffey, J., dissenting).
63. The NLRB itself was formed to cure such elections.
64. Some of the current legislators who agree with “unregulation” may find this idea appealing.
67. See supra note 33.
68. The shortcomings include a sample from a limited region and no indication as to whether the campaigns studied were “effective” campaigns. See also supra note 34.
findings and allows significant misrepresentations which should still be regulated. The best approach would have been to leave *Hollywood Ceramics* intact until more data confirming the findings in Getman-Goldberg were collected in order to prove empirically that *Hollywood Ceramics* should not be the standard.

IV. DECISIONS SINCE MIDLAND

Since the Board reverted to *Shopping Kart* in *Midland*, there have been a number of decisions by both the Board and the courts dealing with campaign misrepresentations. One group of Board decisions summarily disposes of the cases by simply applying the *Midland* rule to the facts at hand.69

In these cases, the Board articulated the findings of the reviewing party,70 followed by a recitation of the *Midland* standard,71 or a simple statement of its meaning, and ended the analysis with a sentence to the effect of "since truth or falsity of campaign statements is no longer taken into consideration, the election will not be set aside."72


70. An Administrative Law Judge, a Hearing Officer or a Regional Director.

71. See supra text accompanying notes 36-67.

72. In Raddison Muehlebach Hotel, 265 N.L.R.B. 634, 111 L.R.R.M. (BNA) 1681 (1982), the union posted anti-employer propaganda which included false and misleading information at the election site on the day of the election, and handed out cards with untrue and deceptive statements. Id. at 634-35, 111 L.R.R.M. (BNA) at 1682. The Hearing Officer found both to be violations under *Hollywood Ceramics*, but the Board certified the union under *Midland* because the objections alleged only misrepresentations of fact, which are no longer determinative in setting elections aside. Raddison, 265 N.L.R.B. at 635, 111 L.R.R.M. (BNA) at 1682-83. In articulating the *Midland* standard, the Board stated a variant of the *Hollywood Ceramics* standard, declaring that an election would be set aside if the document renders "the voters unable to recognize propaganda for what it is." Raddison, 265 N.L.R.B. at 635, 111 L.R.R.M. (BNA) at 1682.

In *Lunstead Designs*, most of the employer's objections were based on oral and written misrepresentations of fact. Based in part on an analysis of *Hollywood Ceramics*, the Regional Director overruled the objections. There were no allegations of forgery as required by *Midland*; therefore, the Board agreed. Lunstead Designs, 265 N.L.R.B. at 800 n.4, 112 L.R.R.M. (BNA) at 1008 n.4.

In Mattera Litho Inc., 267 N.L.R.B. 375, 114 L.R.R.M. (BNA) 1023 (1983), the employer mischaracterized union expenditures on its members' behalf, including in its materials a form filed by the union with the Department of Labor. The Hearing Officer found that the materials contained substantial misrepresentations. Id. at 376, 114 L.R.R.M. (BNA) at 1024. The Board seeing a misrepresentation "virtually identical" to that in *Midland*, overruled the
These cases show a shortcoming of Midland. Elections were still contested, resulting in delays between the time of the election and the union certification. Furthermore, the employee's assessment of the circumstances was tainted. Even though the misrepresentations were not forgeries, they were still substantial. The reviewing officer in each case found no misrepresentation using the Hollywood Ceramics standard. The Board routinely affirmed the reviewing officer's findings by applying Midland. However, Midland's dissenters using the Hollywood Ceramics standard.
ramics standard, agreed with the Board’s finding. The Midland majority emphasized that elections would only be set aside when forged documents were used. The cases rarely address this issue. An explanation for this is that Midland has achieved one of its objectives.

A potential problem arising from Midland is the difference between a misstatement of law and a misstatement of fact. Application of the standard may be different for the different type of misstatement. The Board’s position is not as clear as it first appears. Though the Board has determined that there is no difference between a misrepresentation of fact and one of law, it has decided one case which accepted the distinction.
By having two different methods of analyzing misstatements of law, the Board makes a mockery of its own determination. Simply ruling that alleged misstatements of law are coercive without determining if they are in fact misstatements of law skirts the issue, and is not a precedent which should be set. *Mead Nursing Home* allows the Board to ignore its other precedents. It can deem the statements coercive, allowing them to be analyzed. To determine whether the statements are in fact coercive takes time, delays the commencement of bargaining, and allows for differences of opinion. This conflicts with the intention of *Midland* to achieve finality of election results, and allows for an analysis of the statements without the need to demonstrate that there was a forgery.

The dissent in *Mead Nursing Home* identified fallacies in the Board’s analysis of the case, and raised the question of whether an employee can actually recognize a misstatement of law as propaganda. The dissent also noted that the viability of the “laboratory conditions” test is in jeopardy: as long as the statements do not involve a forged document or cannot be construed as a threat, they can be used in a campaign.

Aside from the aberration of *Mead Nursing Home*, the Board’s failure to distinguish between misrepresentations of fact and misrepresentations of law does not promote the NLRA’s underlying policy.


84. *Midland*, *Furr’s* and *Metropolitan Life*.

85. This is especially true when the person making the statement is someone the employees think is knowledgeable in the area of effects of unionization. *Metropolitan Life Ins. Co.*, 266 N.L.R.B. at 509, 112 L.R.R.M. (BNA) at 1386 (Jenkins, Mem., dissenting).

86. “Quite conceivably, the majority holding in this case even would permit representing to employees that picketing activities are unprotected by the Act, or that employees are entitled by law to receive the normal wages from their employer for time spent attending union meetings or engaging in strike actions.” *Id.* at 509, 112 L.R.R.M. (BNA) at 1387 (Jenkins Mem., dissenting).
of assuring employee free choice of bargaining representatives. Mis-
representations of law have a greater impact on elections than do
misrepresentations of fact because employees are more concerned
about legal ramifications than factual statements.87 The dissenting
viewpoint in Metropolitan Life should be heeded by the Board when
dealing with this issue again because although employees can discern
factual misrepresentations, they may not be able to discern legal
misrepresentations. As a result, the election is no longer a process
where a union wins due to the free and uncoerced choice of the em-
ployees, but one where the party who makes the more appealing le-
gal misstatements is victorious. Such a result clearly conflicts with
the maintenance of "laboratory conditions" as set forth in General
Shoe.

The courts of appeals have had a number of cases before them
dealing with the issue of campaign misrepresentations since Mid-
land. In NLRB v. New Columbus Nursing Home,88 the First Circuit
found the Board to be within its established area of regulation in
formulating the Midland standard and that the Board used the
proper legal standard in the formulation.89 Midland could be applied
retroactively because to do so would cause no "manifest injustice."90

87. Id. The Getman and Goldberg study, supra note 33, did not distinguish between
misrepresentations of fact and of law, but based its findings on general election campaigning.
Because the decisions in Midland and Shopping Kart were premised on the study, this lack of
distinction casts even greater doubt on the Board’s reliance on Midland with respect to misrep-
resentations of law.

88. NLRB v. New Columbus Nursing Home, 720 F.2d 726 (1st Cir. 1983). The em-
ployer objected to the union’s certification on the grounds that the union misrepresented the
employer’s solvency in a letter sent to the employees four days before the election. The Board
overruled the objection applying Hollywood Ceramics. Following certification, Midland be-
came the rule. The employer refused to bargain with the union due to its election misrepresen-
tation. The Board then applied Midland, and, based on the fact that no forged documents
were used in the campaign ordered the employer to bargain.


90. New Columbus at 729. For an in-depth analysis of the retroactivity question see
Certainteed Corp. v. NLRB, 714 F.2d 1042 (11th Cir. 1983), and text accompanying notes
109-21. For other circuit court cases in which Midland was retroactively applied, see NLRB v.
Best Products, 765 F.2d 903 (9th Cir. 1985), where the court ruled that the Board not only
had the authority to formulate Midland, but that the standard would apply retroactively, bas-
ing its decision on the Getman-Goldberg study. Although the decision mentions the detractors
of the study, it never addresses the shortcomings. NLRB v. Best Products at 913 n.12. Hick-
man Harbor Serv. v. NLRB, 739 F.2d 214 (6th Cir. 1984) (Midland was applied retroactively
because the employees were able to discern the misrepresentations for what they were); NLRB
v. Michigan Rubber Prods., Inc., 738 F.2d 111 (6th Cir. 1984) (the Midland standard was
upheld, although the court analyzed the misrepresentation using Hollywood Ceramics); Na-
tional Posters, Inc. v. NLRB, 720 F.2d 1358 (4th Cir. 1983) (the court remanded the case to
the Board despite Midland’s retroactive application because a hearing on the misrepresen-
tations was never held, thus suggesting a way for the court to get enough evidence of a substan-
The court made it clear that it was only passing on the rule's validity "to the situation arising in the instant case."91 There may be situations that involve more fundamental and clear cut misrepresentations where Midland should not apply, for example when the misrepresentations were "so material and fraudulent as to undermine the employees' freedom of choice, rendering their section 7 right to self-organization a nullity. Were this such a case, the Board's flat insistence, under Midland, upon certifying the results of the fraudulent election might constitute legal error."92

The concurring opinion believed Midland to be a result of frustration more than anything else, finding the difficulty in determining a "substantial" misstatement no reason for overruling General Knit. The "routine overlooking" of misrepresentations does not insure free and fair elections, one of the very reasons for creating the Board. The court also voiced the concern that the rule would only help the unions, since a union cannot be hurt by its own misrepresentations.93

In Mosey Manufacturing,94 each stage of the case took place under a different campaign misrepresentation standard.95 The court...
did not know which standard to apply. A judicial review under *Shopping Kart* was never made; to do so would have required revised briefs and new arguments, further delaying the election.

It also would have been unfair to the company if it were entitled to relief under one standard but not the other. The circumstances of the case militated against the Board's retroactive application of the *Midland* standard. There was too long a time delay and too narrow a victory margin for the Board to have recognized that this case existed when it decided in *Midland* to apply retroactively the standard.

In deciding *Midland*'s soundness, the court applied the "substantial evidence" standard rather than the "abuse of discretion" standard. The "abuse of discretion" standard only applies to decisions with certain characteristics, none of which are present in a "Board-created election [for] contested facts." The Board findings on the misrepresentations were not supported by substantial evidence, and thus were invalid. Ordinarily, the case would have been remanded for a Board determination of which standard to apply, but the Board's previous indecision with regard to a choice of a standard had led the court to deny enforcement of the order. In the cases since *Mosey,* the court shifted from an unbridled application of *Midland* to a limitation of its scope.

Between the time of oral argument and the decision the Board decided *Midland* and applied the rule to all pending cases. *Mosey* at 612.

96. One vote.

97. *Mosey* at 612.

98. The decision's dominating factors cannot be evaluated; subjective, not objective, factors are used in coming to the decision; uniformity is not important. *Id.* at 615.

99. *Id.*

100. "In the circumstances, unless we can properly enforce the Board's order without a remand, we shall deny enforcement outright." *Id.* at 613.

101. NLRB v. Chicago Marine Containers, 745 F.2d 493 (7th Cir. 1984); NLRB v. Milwaukee Brush Mfg. Co., 705 F.2d 257 (7th Cir. 1983); St. Elizabeth Hosp. v. NLRB, 715 F.2d 1193 (7th Cir. 1983).

102. In *Milwaukee Brush* the employer sought to set the election aside based on material misrepresentations. The Board overruled the exception, and the court agreed by simply citing *Midland,* stating that the Board no longer considers this type of misrepresentation enough to set an election aside, and that the rule is to be applied retroactively. *Milwaukee Brush,* 705 F.2d at 258.

In *St. Elizabeth Hosp.*, the union president's letter sent three days before the election allegedly contained misrepresentations. *St. Elizabeth Hosp.*, 715 F.2d at 1197. The Regional Director found no material misrepresentations using *Hollywood Ceramics,* and the Board agreed. *St. Elizabeth Hosp.* at 1198. However, the court found the record insufficient to conclude whether the union was guilty of material misrepresentations. *Id.* The Board's intention to apply *Midland* retroactively was also questioned.

Because this election was exceedingly close and the ultimate outcome of the controversy may be determined by which standard applies [the issue is remanded] for a
Mosey had two dissents. One disagreed with the majority's finding of Board indecision regarding application of a standard and concluded that the language of Midland left no question that Shopping Kart, not Hollywood Ceramics, applied to the case, making a remand unnecessary. It also disagreed with the majority's observation that a new election would protect the worker's freedom of choice. The original election had already been delayed, and an order requiring a new election could result in another two years of delays. This would have undermined the employee's right to representation, notwithstanding the Board's "fickleness."

The other dissent found that the situation did not warrant setting aside the election even under Hollywood Ceramics, and that there was no question as to which standard to apply. The standard at the time of the election was the same as in Midland, and shifts in between were irrelevant. The certification-year rule was extended to mean that "delay alone cannot destroy the presumption of continued majority status," so the dissent reasoned that the majority was wrong in finding that the delay caused by the Board shifts was sufficient reason to deny enforcement.

There has been a series of cases in which the court determined it unnecessary to decide whether Midland retroactively applied.

Board determination of whether the . . . Midland standard applies or whether this case is an extraordinary one calling for an exception to the Midland retroactivity rule and whether the election should be set aside because of improper Union conduct.

Id. at 1198 (emphasis added).

The court gives the Board a choice. This indicates that Midland is too narrow and circumstances may exist where a substantial misrepresentation is enough to set an election aside. This is borne out by Chicago Marine Containers, 745 F.2d 493, in which the court applied Midland to the case before it, but explicitly stated that there might be cases in which Midland should not be applied. Chicago Marine Containers at 498 n.4. The unusual circumstances of Mosey were not present in Chicago Marine Containers, so a remand was not necessary. Chicago Marine Containers at 499.

103. Mosey at 617.
104. Id. For an empirical evaluation of delay in election campaigns, see Roomkin & Block, supra note 80.
105. Id. at 623. The problem with this is that the standard in force may not be one of which the court approves, and for that reason the court may deny enforcement of the bargaining order. Also, a long time delay and a one vote victory margin may make enforcement of the bargaining order unfair to the current employees who may have chosen a different bargaining representative.
106. Id. at 626.
107. This is not a good argument. The time between the election and the decision was more than five and one-half years. The presumption of continued majority is much weaker than in a case decided within one year of the election.
108. Bauer Welding and Metal Fabricators, Inc. v. NLRB, 758 F.2d 308 (8th Cir. 1985); Vitek Elecs., Inc. v. NLRB, 763 F.2d 561 (3d Cir. 1985); Arlington Hotel Co. v.
Initially, the analysis of the campaign misrepresentations used the Hollywood Ceramics standard, with the Board arguing that Midland retroactively applied. The court then used Hollywood Ceramics to analyze the misrepresentation, finding it unnecessary to decide the retroactivity question.\(^{109}\)

The Eleventh Circuit wrestled with the retroactivity question in Certainteed Corp.\(^{110}\) The company asserted that the union misrepresented the amount of wages paid by the company. Using Hollywood Ceramics, the Board found that the misrepresentations did not warrant setting aside the election using Hollywood Ceramics. During the pendency of the appeal the Board decided Midland. Because an evidentiary hearing had not previously been held, the court found it necessary to determine whether or not Midland applied.\(^{111}\)

The court analyzed the misrepresentations using Hollywood Ceramics,\(^{112}\) and found that the Board had erroneously dismissed the company’s objection. Because the company had not had ample opportunity to reply, a hearing was necessary.

The Midland standard was deemed not to be arbitrary.\(^{113}\) The return to Shopping Kart was found not to be inconsistent with the statutory design.\(^{114}\) The shifting of the Board’s policy in this area does not undermine its expertise but instead underscores the “trial and error” inherent in the administrative process.\(^{115}\)

---

\(^{109}\) The court’s deference to Hollywood Ceramics, without a stated preference for Midland, could be a signal by the court that Hollywood Ceramics should always be applied since it is the better of the two standards. The court may be waiting for a case that is a material misrepresentation under Hollywood Ceramics to state its preference explicitly. But see NLRB v. Yellow Transp. Co., 709 F.2d 1342 (9th Cir. 1983), where the Ninth Circuit implicitly agreed with the Midland standard by not remanding the case for an evidentiary hearing even though Midland was applied retroactively.

\(^{110}\) See Certainteed Corp. v. NLRB, 714 F.2d 1042 (11th Cir. 1983).

\(^{111}\) Id. at 1047.

\(^{112}\) A four-part test is used by the Eleventh Circuit: (i) whether there has been a misrepresentation of a material fact, (ii) whether the misrepresentation came from a party in an authoritative position to know the truth, or who had special knowledge of the facts, (iii) whether the other party in the election had adequate opportunity to reply and to correct the misrepresentation, and (iv) whether the employees had independent knowledge of the misrepresented fact so that they could effectively evaluate the propaganda. Id. at 1049.

\(^{113}\) The rule is one that will be easy to administer and is limited to statements that cannot be evaluated on their faces. Id. at 1053.

\(^{114}\) This conclusion was based on the findings of the Getman-Goldberg study, supra note 33. But see supra text accompanying note 33.

\(^{115}\) As an administrative agency, the Board can institute a policy on an experimental basis. If the rule does not meet the original expectations, it can be changed. As with all admin-
The court found the retroactivity question to be a puzzling one. The Board can apply *Midland* retroactively to cases before the courts, but it may not have intended to do so. *Midland* itself does not explicitly address the standard’s application to cases pending before the courts. In *Blackman-Uhler*, the Board considered whether *Shopping Kart* should be applied retroactively, and decided that the finality of the decision precluded the retroactive application. It was not clear that *Midland* had set out to reverse this. After analyzing Board decisions dealing with the retroactivity of *Shopping Kart* and *General Knit* and the meaning of *Midland*, the court remanded the case back to the Board to determine if *Midland* applied.

The Board found that *Midland* should indeed have been applied retroactively in this case. The Board realized that its decision was not determinative on the courts, but wanted to give the Eleventh Circuit, as well as the other circuits, guidance in this area. The *Midland* rule was determined to best accommodate and serve the interest of all, and for that reason the present Board believed it should be applied retroactively.

The hope espoused in *Midland* of minimizing disagreement between the Board and the courts has not yet been realized. The circuit
courts have not been receptive to applying Midland’s standard to all future cases. In some instances, the courts decided that the standard was too narrow, and that even misrepresentations that were not forgeries could violate the employees’ section 7 rights. In such cases, the misrepresentations should be analyzed to determine if the election should be set aside.123

The majority of the circuit courts have not stated a preference for the Midland standard. The Board’s ability to formulate the rule has been upheld, but the wisdom of the new formulation is still an open question.124

V. Conclusion

The Board’s current campaign misrepresentation standard most likely will not be its last. The wavering of the past is bound to continue. The inconsistency is not a result of the Board’s application of the rule from its inception, but rather of the courts’ stand on the cases before them.

The standard is too narrow. The Board’s decision to analyze only forgeries does not protect even the most sophisticated employees who can discern propaganda from the truth. There must be sanctions against parties who engage in fraudulent activities prior to an election in addition to punishment for those making substantial misrepresentations. Though Getman and Goldberg do not believe campaigns have an impact on election outcome, their study alone is not enough of a basis for eliminating an entire area of protection.

Midland allows too much freedom during the campaign. Under Hollywood Ceramics there was at least the possibility of a deterrent effect. Under Midland, as long as there is no forgery there will be no punishment.

It is arguable that the Hollywood Ceramics standard is too protective. However, in this area the Board should be overprotective.125

The only misrepresentations which have been analyzed were those determined to be “substantial.” The Midland court tried to define “substantial,” with questionable success. A narrow definition may be impossible to formulate, so perhaps employee free choice can best be

123. See supra text accompanying notes 88-109.
124. The Ninth Circuit is the only circuit agreeing with Midland. See NLRB v. Best Prods. Co., Inc., 765 F.2d 903 (9th Cir. 1985) and NLRB v. Yellow Transp. Co., 709 F.2d 1342 (9th Cir. 1983).
protected and laboratory conditions maintained by reinstating the standard for campaign misrepresentations espoused in *Hollywood Ceramics* and *General Knit*.

Douglas M. Lieberman