Copyright 1984 by Northwestern University School of Law
Northwestern University Law Review

Printed in U.S.A.
Vol. 79, No. 4

THE RELATIONSHIP BETWEEN FREE CHOICE AND LABOR BOARD DOCTRINE: DIFFERING EMPIRICAL APPROACHES

*Stephen B. Goldberg**
*Julius G. Getman***
*Jeanne M. Brett****

I. INTRODUCTION

In *Union Representation Elections: Law and Reality*[1] [hereinafter cited as *Law and Reality*], we examined the desirability of continued National Labor Relations Board (NLRB) regulation of pre-election campaigning. Our central finding, based upon a study of thirty-one elections and interviews with over a thousand employees, was that unlawful campaigning has no greater effect on employee voting behavior in union representation elections than does lawful campaigning. Hence, we recommended that the Board should no longer attempt to distinguish between lawful and unlawful campaigning; that the results of an election, once conducted, should be final; that speech should be wholly free; and that the Board should neither set aside elections nor find unfair labor practices based on oral or written communications by an employer or a union.[2]

Another key finding was that an employer who uses working time or premises to campaign against unionization, as many do, communicates with a substantially greater proportion of the employees than does the union, which is normally unable to campaign on working time or premises.[3] Accordingly, we recommended that whenever an employer cam-

* Professor of Law, Northwestern University Law School.
** Professor of Law, Yale Law School.
*** Professor of Organization Behavior, Kellogg Graduate School of Management, Northwestern University.

The comments of Professor Bernard Meltzer of the University of Chicago Law School were, as usual, invaluable.

1 J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976) [hereinafter cited as LAW AND REALITY].

2 *Id.* at 139-53.

3 In NLRB v. United Steelworkers (Nutone, Inc.), 357 U.S. 357 (1958), the Supreme Court held that an employer did not violate the NLRA by campaigning against union representation on working time or premises, while preventing similar campaigning on behalf of the union, unless the

HeinOnline -- 79 Nw. U. L. Rev. 721 1984-1985

paigns against union representation on working time or premises, it should be required to allow the union (or unions) the opportunity to do so.[4] Finally, we recommended the use of quicker and more effective remedies than are presently available when an employer engages in retaliatory actions against union supporters, particularly during a union organizing campaign.[5] In sum, it is our view that the basic NLRA goal of protecting employee free choice can be furthered most effectively by abandoning the current scheme of government regulation of pre-election campaigning, and substituting, in its place, a free marketplace of ideas in which the government's role is limited to insuring union access to employees and providing adequate remedies when an employer seeks to punish union supporters by discharge.

Professor Paul Weiler, in his recent article, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*,[6] disputes both our finding that unlawful campaigning has no greater effect on vote than does lawful campaigning and our recommendation that Board regulation of campaigns be discontinued.[7] Focusing on data which indicate that the number of employer unfair labor practices has increased in recent years, and that the frequency of union victories in representation elections has decreased, Weiler concludes that "discriminatory discharges and other forms of coercive behavior by American employers have significantly contributed to the steep decline in union success under the NLRA."[8] Weiler recommends that legal regulation of pre-election campaigning continue unabated, and that the effects of such campaigning be minimized by holding an election immediately upon a union's presentation of enough cards to indicate substantial employee interest.[9]

Thus, as we enter 1985, the fiftieth anniversary of the enactment of the National Labor Relations Act, both Weiler and we recommend significant amendments in that act to provide greater protection for employee free choice. We differ, however, on what those amendments should be. In substantial measure, that difference is a product of our differing analyses of the data reported in *Law and Reality*. In this article we set out Weiler's criticisms of our analyses of those data, as well as a reanalysis by Professor William Dickens, on which Weiler heavily relies.

---

employer's campaign created an imbalance in opportunities for organizational communication. The NLRB has rarely found such an imbalance to exist. *See* LAW AND REALITY, *supra* note 1, at 19-20, and cases cited therein; R. GORMAN, LABOR LAW 179-94 (1976); R. WILLIAMS, P. JANUS & K. HUHN, NLRB REGULATION OF ELECTION CONDUCT 245-48, 286-90 (1974).

4 LAW AND REALITY, *supra* note 1, at 156-59.

5 *Id.* at 155-56.

6 96 HARV. L. REV. 1769 (1983) [hereinafter cited as Weiler, *Promises*]. *See also* Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984).

7 Professor Weiler does not discuss our equal access recommendation.

8 Weiler, *Promises*, *supra* note 6, at 1783.

9 *Id.* at 1805.

HeinOnline -- 79 Nw. U. L. Rev. 722 1984-1985

We show that neither the Weiler criticisms nor the Dickens reanalysis are sound, and conclude that if employee free choice under the NLRA is to receive meaningful protection the reforms advocated in *Law and Reality* must be effectuated.

II. WEILER'S CRITIQUE

Professor Weiler concedes that *Law and Reality* poses a major challenge to his conclusion that employer unfair labor practices have interfered with the statutory right of employees to bargain collectively, but he asserts that there exist two critical flaws in our analysis of the data collected in that study.

> The first consists in the study's appraisal of the evidence of the impact of coercive campaigning by employers. The authors actually found that, among the surveyed workers who had indicated before the campaign either that they were undecided or that they favored the union, the percentage of votes against unionization was somewhat higher after an illegal employer campaign than after a clean one. The magnitude of this difference, however, was too small to pass a 99% test of statistical significance in such a limited sample. Thus, the authors asserted, one could not conclude with certainty that the observed relation was attributable to anything but chance.
>
> This sort of statistical judgment is hardly sufficient for the making of legal policy. It may be legitimate for Getman and his coauthors to conclude that their own data do not demonstrate with certainty that employer coercion affects employee voting, but it is entirely unjustified to infer from that fact alone that the contrary is true. The failure to find a statistically significant connection between employer intimidation and employee votes in this limited sample neither proves that there is no such relationship nor provides a basis on which to argue that we may safely abandon efforts to protect employee choice. Legal policy must almost invariably be formulated in the absence of absolute certainty about the causes and effects of social phenomena. Given the inherent plausibility of the notion that employees will respond to threats to the jobs that are crucial to their lives, and given that the data in the Getman study indicate that it is more likely than not that such threats do affect employee votes, it is only prudent to take steps that will ensure freedom of choice in the workplace.[10]

Implicit in the foregoing quotation is the suggestion that the absence of a statistically significant relationship between illegal employer campaigning and employee vote, which we reported in *Law and Reality*, may be due in part to a "limited sample." To be sure, if a sample is quite small, say fifty or fewer, observed differences must be large before they will be statistically significant. That is because in a small sample slight differences may be due to chance. However, our finding that employer unfair labor practices did not have a significantly greater effect than did lawful campaigning was based upon sample sizes well in excess of fifty. The particular analysis to which Weiler refers in the foregoing quotation

[10] *Id.* at 1783-84 (footnotes omitted).

HeinOnline -- 79 Nw. U. L. Rev. 723 1984-1985

was based upon data collected regarding 489 employees who were classified as potential union voters because they had signed a union authorization card; 444 employees who had been predicted to vote union based on their attitudes; 485 employees who stated that their intent was to vote union; and 63 employees who stated that they were undecided how to vote.[11] In samples of this size, even comparatively small numerical differences tend to have statistical significance.[12] Thus, the absence of a statistically significant relationship between unlawful campaigning and vote in our sample is no mere artifact of a limited sample size; it rests solidly upon the observed behavior of hundreds of potential union voters in both lawful and unlawful election campaigns.[13]

Also implicit in the quoted language from Weiler's article is the suggestion that our conclusions concerning the effect of unlawful campaigning are based solely on the absence of a statistically significant relationship between such campaigning and vote. Nothing could be further from the truth. In fact, our conclusions and recommendations are the result of a wide variety of analyses, the combined effect of which is to demonstrate that unlawful campaigning has no greater effect upon vote than does lawful campaigning.

For example, employees in each election were asked why they had voted for or against union representation. Of 452 employees who voted against unionization, fewer than one percent gave reasons for doing so that related to unlawful employer campaign tactics;[14] those few were evenly distributed among lawful and unlawful elections.[15] It is possible that employees who voted against the union because of fear caused by unlawful campaign tactics were reluctant to admit this fear either to themselves or to our interviewers. Yet, if such reluctance exists, it should not have deterred those employees from projecting their fears onto other employees and reporting that the latter had voted against the union because of unlawful campaign tactics. Those who gave reasons

---

[11] LAW AND REALITY, *supra* note 1, at 114-15, 132, 162, 165. While many of the same employees were identified as potential union voters by each method, we examined the effect of unlawful campaigning on each of the four groups separately.

[12] In general, as sample size increases, the distribution of a sample statistic around the population parameter decreases. The rapidity of this decrease depends upon the particular statistic, but the distributions of bivariate statistics tend to decrease rather rapidly, and a sample size in excess of 100 is considered to be large. *See* M. FISZ, PROBABILITY THEORY AND MATHEMATICAL STATISTICS 367-68 (1963).

[13] Of the 31 elections we studied, the employer was found to have engaged in unlawful campaigning in 22. In the other 9 elections, all employer campaigning was lawful. LAW AND REALITY, *supra* note 1, at 111-13. If unfair labor practices charges were decided by the Board, the Board's decision was used to determine the legality of the campaign. If no charges were filed, or if the Board did not rule on those charges, a determination as to whether unfair labor practices had been committed, and, if so, the appropriate remedy, was made by an experienced NLRB judge, acting in an unofficial capacity. *Id.* at 44-45.

[14] *Id.* at 98 (Table 4-14).

[15] *Id.* at 115.

HeinOnline -- 79 Nw. U. L. Rev. 724 1984-1985

other than unlawful campaigning for their own vote did not, however, attribute the antiunion votes of others to unlawful campaign tactics.[16]

The conclusion that unlawful campaigning has a greater effect than lawful campaigning was disproven not only by the direct evidence of employee voting behavior and the reasons given by employees for that behavior, but also by the indirect evidence of employee perceptions. Employee reports of unlawful employer campaigning were no more frequent in elections in which such campaigning occurred than elections in which it did not.[17] Furthermore, potential union voters who switched to vote against the union were no more likely to perceive unlawful campaigning on the part of the employer than were potential union voters who remained loyal to the union.[18] Altogether, these results suggest that unlawful campaigning did not significantly affect employee vote.

Professor Weiler asserts that the second flaw in our analysis is that we focussed on individual voting behavior rather than on election outcome.[19] We did, however, analyze the relationship between unlawful campaigning and election outcome, with results that were wholly consistent with our individual voter analysis. Thus, we predicted the outcome of each election using information available to us prior to the campaign—how employees intended to vote and what their attitudes were towards unions and their employer. If unlawful campaigning coerces employees into voting against union representation, a precampaign prediction that the union will win should frequently be wrong when the employer campaign is unlawful. In fact, there were eight elections in which the precampaign voting intention of the employees predicted a union victory. The union won seven of those elections, even though unlawful employer campaigning took place in four of them. To be sure, one of the elections marked by unlawful campaigning was lost by the union, but that single instance hardly demonstrates the impact of unlawful campaigning. Indeed, the union won one election that we not only predicted it would lose, but that contained unlawful employer campaigning.[20] These data provide additional support for the conclusion that

---

16 *Id.* at 116.

17 *Id.* at 116-20. Employee reports of unlawful employer campaigning were elicited by asking employees whether the employer had taken or threatened harmful action against union supporters, and whether the employer had given or promised benefits to employees to get them to vote against the union. If an employee answered either question affirmatively, that employee was asked what the employer had said or done. *Id.* at 182-83. In addition, the answers to all questions were examined to determine if an employee perceived the employer to have utilized unlawful campaign tactics.

18 *Id.* at 120-24.

19 Weiler, *Promises*, *supra* note 6, at 1784-85.

20 *See* LAW AND REALITY, *supra* note 1, at 64, 112-14 (Tables 5-1, 5-2), 213 (Appendix F). Precampaign intent predicted a union victory in elections 1, 3, 9, 11, 19, 20, 21 and 25. The union won all of these elections except 25. The union also won election 33, in which precampaign intent predicted a company victory. Employer unfair labor practices occurred in elections 1, 11, 21, 25 and 33.

HeinOnline -- 79 Nw. U. L. Rev. 725 1984-1985

election outcomes are unlikely to be affected by unlawful campaigning.

Other election-level data demonstrate the costs of Board regulation in terms of its frequent overriding of employee free choice, the very interest on which the proponents of Board regulation rely to support its continuation. Of the twenty-three elections lost by the union, the Board found unlawful campaigning to have taken place in thirteen, issuing bargaining orders in seven and rerunning six. Our precampaign analysis of intent, however, predicted that the union would lose all thirteen of those elections wholly without regard to the content of the employer campaign.[21] Thus, even if Board regulation may have saved the union from a defeat in one election in which pre-campaign intent forecasted a union victory, it did so at the cost of rerunning six elections and installing the union as the bargaining representative of the employees in seven elections—in all of which a majority of the employees indicated both before the campaign and at the ballot box that they did not wish union representation. Weighing the costs of Board regulation in those thirteen elections—the overriding of employee free choice in seven elections and the delaying of that free choice in six elections—against the assumed benefit of protecting employee free choice in one election, it is clear to us that the costs far exceeded the gains. In sum, Professor Weiler to the contrary notwithstanding, *Law and Reality* does focus on election outcomes, and that analysis strengthens, rather than weakens, the conclusions we reached upon our analysis of individual voting behavior.

III. THE DICKENS REANALYSIS

Professor Weiler's attack on the findings reported in *Law and Reality* rests heavily upon a reanalysis of our data by Professor William Dickens.[22] According to Dickens, his reanalysis shows that a person voting in an election in which illegal speech or illegal actions occurred is two percent less likely to vote for the union than is a person voting in an election in which neither of those activities took place. Dickens concedes, however, that these results are not significant.[23] He also concedes that "point estimates do not tell the whole story. Standard errors give us information on how sure we can be of the magnitude of certain effects. The probability that the effect of illegal speech or of illegal actions is to reduce the probability of the average person voting union by more than one percent is 57 percent."[24] Stated otherwise, the likelihood that illegal speech

---

21 *Id.*

22 *See* W. Dickens, Union Representation Elections: Campaign and Vote (Oct. 1980) (unpublished Ph.D. dissertation, Department of Economics, Massachusetts Institute of Technology) [hereinafter cited as Dickens thesis]. An edited version has been published as Dickens, *The Effects of Company Campaigns on Certification Elections:* Law and Reality *Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983) [hereinafter cited as Dickens, *Company Campaigns*].

23 Dickens thesis, *supra* note 22, at 90.

24 *Id.*

HeinOnline -- 79 Nw. U. L. Rev. 726 1984-1985

or actions will cause a one percent change in voting behavior is, according to Dickens, about fifty-fifty. Furthermore, Dickens admits that "[w]e cannot be very sure of the magnitude of these effects. They could be quite large or quite small, and *they could even have the opposite sign.*"[25]

Professor Dickens next creates an additional category of unlawful campaigning that he calls "threats or actions against pro-union employees." This category has no legal significance, however, since the Board does not, and never has, attempted to distinguish between threats or acts of reprisal, or promises or grants of benefit, on the basis of whether they were directed against all employees or solely at pro-union employees. Furthermore, Dickens excludes from the category of threats or actions against pro-union employees the unlawful interrogation of employees regarding their union activities and the surveillance of employees' union activities. An implied threat of reprisal for participating in union activities, however, lies at the heart of Board proscription of both interrogation and surveillance.[26] Since that threat will normally be directed against pro-union employees, it makes little sense to exclude interrogation and surveillance from the category of threats or actions against pro-union employees.[27] Furthermore, interrogation or surveillance took place in many more than the five elections that Dickens categorizes as marked by threats or actions against pro-union employees.[28] Hence, one must be skeptical of any conclusions concerning the effect of conduct characterized by Dickens as threats or actions against pro-union employees.

It is, however, only this self-created category of unlawful activity that Dickens finds to have had a significant effect on vote. Thus, he states that an employee voting in any of the five elections in which he found this category of unlawful practice to have occurred was 15 percent less likely to vote union than an employee in an election in which this conduct did not occur.[29] As noted, this is a significant difference, and its significance is reflected in the tighter confidence interval around the point estimate. "The probability that the effect of actions or threats against the union is greater than a one percent reduction in the probability of an average individual voting union is 98 percent."[30] Combining the three

---

25 Dickens, *Company Campaigns*, *supra* note 22, at 569-70 (emphasis supplied). For the benefit of those not familiar with the implications of non-significant statistical results, the meaning of the last sentence is that, as far as Professor Dickens' analysis shows, illegal speech and action are equally likely to increase, decrease, or have no effect upon the probability of the average worker's voting union.

26 *See* LAW AND REALITY, *supra* note 1, at 9-11 and cases cited therein; R. GORMAN, *supra* note 3, at 172-73; R. WILLIAMS, P. JANUS & K. HUHN, *supra* note 3, at 168, 176, 189.

27 For essentially the same reasons, it makes little sense for Dickens to categorize interrogation as illegal action, rather than illegal speech. *See* Dickens thesis, *supra* note 22, at 71.

28 LAW AND REALITY, *supra* note 1, at 112-14 (Interrogation or surveillance occurred in fifteen elections.).

29 Dickens thesis, *supra* note 22, at 90.

30 *Id.* at 90-91.

HeinOnline -- 79 Nw. U. L. Rev. 727 1984-1985

categories of illegal speech, illegal actions, and illegal threats or actions against pro-union employees, Dickens finds an estimated coefficient value of -.177 for the commission of illegal practices, which, he states, roughly corresponds to a 4 percent decrease in the probability of the average worker voting union.[31] This statistically significant combined effect at the 1% level is, however, due to the inclusion of Dickens' self-created category of threats and actions against pro-union employees. Furthermore, Dickens' Table VII.3,[32] reproduced below, shows that while there is a 93 percent probability that all violations, taken together, will reduce the likelihood of a pro-union vote by more than 1 percent, the probability of a reduction of more than 5 percent is only 40 percent, or less than 50-50.

TABLE VII.3
AGGREGATE EFFECTS OF THE AVERAGE CAMPAIGN

Specification:[33]	Coefficient (s.e. in paren)	Probability that effect is to reduce likelihood of union vote by:			
		>1%	>5%	>10%	>20%
N.L.R.B. Remedy					
Effect of Violations	−.155* (.089)	90%	30%	<1%	<1%
Effect of Legal Campaign	−.385* (.229)	93%	79%	48%	3%
Effect of Total Campaign	−.540** (.224)	98%	93%	73%	12%
Specific Violations					
Effects of Violations	−.177* (.092)	93%	40%	<1%	<1%
Effect of Legal Campaign	−.473** (.197)	98%	91%	64%	4%
Effect of Total Campaign	−.650*** (.181)	99%	99%	91%	20%

Statistical Significance:
* = .05 (one tail)
** = .01 (one tail)
*** = .001 (one tail)

[31] *Id.* at 92. Dickens is estimating a model to determine how much each of a number of factors, such as illegal practices, contributes to the prediction of vote. The estimated coefficient value results from the application of the model to the data.

[32] *Id.* at 99.

[33] By "specification," Dickens refers to one of two means by which to measure the effects of illegal practices. The "N.L.R.B. Remedy" specification seeks to analyze the effect of various factors in elections in which the NLRB remedy for illegal practices was a bargaining order as compared to elections in which the remedy was a cease and desist order or a rerun election. The "Specific Violations" specification seeks to compare elections in which illegal speech, illegal actions, or threats

HeinOnline -- 79 Nw. U. L. Rev. 728 1984-1985

In sum, Dickens is able to find an effect of illegal campaigning of which he is confident only by creating a category of unfair labor practices that has no independent legal significance—threats or actions against pro-union employees. The Board, however, does not limit its proscriptions to this type of speech or conduct. To the contrary, the Board will equally set aside an election or issue a bargaining order in an election characterized by threats or acts against *all* employees. Thus, the argument for continued Board regulation, to the extent that it rests upon this aspect of Dickens' reanalysis, is that the Board should be free to overturn *all* elections characterized by unlawful campaigning because the outcome of a few *might* have been affected by employer conduct. Overturning the results of elections not affected by employer conduct itself interferes with employee free choice, however. Furthermore, Dickens concedes that most of the elections which the Board sets aside are characterized by employer conduct that, as far as he can tell, does not interfere with employee free choice. Hence, the Dickens reanalysis provides no basis for retaining the existing scheme of Board regulation.[34]

Professor Weiler states, relying on Dickens' Table VII.3, that "when both legal and illegal practices were taken into account, it was more than

---

of actions against union supporters took place as compared to elections in which none of this conduct took place. *See* Dickens thesis, *supra* note 22, at 70-72 (footnote added).

[34] Empirical researchers may wish to discount Dickens' results on more technical grounds. Dickens fails to include any variables dealing with the union campaign in his model. His lengthy justification of this decision argues that such company campaign decisions as "holding a certain number of meetings, sending a series of letters to workers' homes, or running a clean or illegal campaign are made, for the most part, before the campaign begins," Dickens, *Company Campaigns*, *supra* note 22, at 564, and that "the union campaign is endogenous, and the level of union campaign activity cannot be included in an analysis of the effects of company campaigns without biasing the results." *Id.* This assumption is contrary to what we know about union and company campaigning. It thus violates accepted standards for inclusion of variables in causal models. Standards for including variables in causal analysis dictate that relevant causes (e.g., union campaign activities) may be left out of a causal model when they are either uncorrelated with other relevant causes in the model (e.g., company campaign activities) or are perfectly correlated with another relevant cause or linear combination thereof. *See* L. JAMES, S. MULAIK AND J. BRETT, CAUSAL ANALYSIS (1982).

To check our assumption, we constructed a disaggregated data file based on the 1068 voters in the elections we and Dickens studied. This data file contained vote, the company campaign data used by Dickens (supplied by us), the number of early company meetings and letters, the number of late company meetings and letters, the percent of workers talked to by superiors, the illegal campaign categories developed by Dickens (illegal speech, illegal activities, threats and acts against union supporters), bargaining orders and other remedies, the number of early and late union letters and union meetings *and* union campaign data (supplied to Dickens but not used by him). The question from a model specification point of view is whether any of the union campaign variables correlate significantly with vote and with any of the company campaign variables. They do. Late union meetings correlate significantly with vote ($r=.12$; $p \leq .001$), and at $p \leq .01$ with *all* the company campaign activities, and with all the illegal campaign indices except illegal activities. Since union and company campaign activity are correlated, Dickens has built a bias into all the coefficients of his results by leaving out indicators of the union campaign. Thus, the coefficients indicating the effects of the company campaign and of illegal behavior are either overestimates or underestimates of the true coefficients.

HeinOnline -- 79 Nw. U. L. Rev. 729 1984-1985

99 percent certain that the typical employer campaign reduced by at least 5% the probability that the average worker would vote for unionization, and it was more than 90% certain that the campaign reduced that probability by at least 10%."[35] When Dickens refers to the "legal campaign," however, he does not distinguish legal from illegal campaigning, that is, those speeches protected by section 8(c) from those violating section 8(a)(1). Rather, Dickens categorizes campaign activities in a wholly different fashion, without regard to their legality or illegality. In this categorization, the "legal" campaign consists of written communications, meetings, and supervisors' activities analyzed in terms of when and how frequently they take place, not in terms of their legality or illegality.[36] This, then, is a measure of the volume of the employer's campaign, not its legality. Some of the employer's letters and meetings undoubtedly contained illegal speech, but that fact is irrelevant for purposes of this measure. Because the two measures are based on different criteria, Dickens' efforts to aggregate them, relied upon by Weiler, are unsound. In this context, adding the effect of violations and the effect of the legal campaign is like adding the weight of an object to its height; it produces a figure, but that figure is meaningless.

It is possible, however, to compare the results obtained by measuring the effect of the employer's campaign in terms of its illegality with the results obtained by measuring that campaign in terms of its level of activity without regard to legality. Table VII.3 permits such a comparison, and the results are intriguing. The probability that the effect of unlawful campaigning is to reduce the likelihood of a union vote by more than a specified percentage tails off sharply as one moves away from 1 percent. The likelihood of greater than a 5 percent reduction as a result of unlawful activity is 40 percent, and the likelihood of greater than a 10 percent reduction is less than 1 percent. The likelihood that a high volume of employer campaign activity will reduce the likelihood of a union vote is greater, with a 91 percent probability of more than a 5 percent reduction, and a 64 percent probability of more than a 10 percent reduction. Thus, even if Dickens' reanalysis is accepted, it provides no support whatsoever for continued Board regulation, as there is little sense in incurring the costs of such regulation in order to have the Board ferret out illegal tactics that, by Dickens' calculation, matter far less than the volume and timing of employer campaigning, matters over which the Board has no control whatsoever.[37]

---

35 Weiler, *Promises*, *supra* note 6, at 1784.

36 Dickens, *Company Campaigns*, *supra* note 22, at 566.

37 In LAW AND REALITY, *supra* note 1, at 107-08, we suggested that the fact that the employer conducted a campaign, without regard to the specific content of that campaign, or its legality, might have an effect on employee voting behavior. That suggestion is wholly consistent with Dickens' conclusion that the volume and timing of the employer campaign matter more than its legality or illegality.

HeinOnline -- 79 Nw. U. L. Rev. 730 1984-1985

Professor Weiler next relies on Dickens' computer simulation of elections, reproduced below, to argue that "the raw data that Getman and his coauthors so carefully gathered point to precisely the opposite conclusion from the one they drew."[38]

TABLE VIII.2[39]
SIMULATED EFFECTS OF CAMPAIGNS ON ELECTION OUTCOMES IN PERCENTAGES OF 3,100 SIMULATED ELECTIONS WON BY THE UNION

	TYPE OF CAMPAIGN						
Specification:	(1) Actual Campaign	(2) All Violations Committed in every case	(3) No Violations Committed in any case	(4) No Company Campaign in any case	(5) Intense Company Campaign in every case*	(6) Intense Legal Campaign in every case**	(7) Light Legal Campaign in every case
N.L.R.B. Remedy	36%	25%	44%	66%	5%	9%	58%
Specific Violations	36%	17%	47%	67%	4%	22%	63%

* All violations committed in every case.
** No violations committed in any case.

We doubt that any conclusions can be drawn from Dickens' simulation data. First, the simulation rests on the assumptions of Dickens' original model, including the assumption that company campaign activities are unrelated to union campaign activities. Second, the results of Dickens' simulation cast substantial doubt upon its reliability. For example, if one compares, in the NLRB remedy row, column 2 (all violations—original level of campaigning)[40] with column 3 (no violations—original level of campaigning), illegal campaigning appears to reduce the union's likelihood of winning an election from 44 percent to 25 percent.[41] However, if one next compares column 2 (all violations—original level of campaigning) with column 6 (no violations—increased level of campaigning), one finds that the absence of violations, coupled with an increase in the level of campaigning reduced the likelihood of a union victory from 25 percent to 9 percent. This suggests that it is not illegal campaigning that hurts

38 Weiler, *Promises*, *supra* note 6, at 1786.

39 *See* Dickens thesis, *supra* note 22, at 104.

40 Dickens' measure of the intensity of campaigning in this table is the same as in Table VII.3, *see supra* text accompanying note 33,—the volume of written communications, meetings, and supervisory conversations with employees. Dickens thesis, *supra* note 22, at 106-07.

41 All comparisons are to data in the NLRB remedy specification, rather than the specific violation specification. *See supra* note 33. While the proportion of union victories differs slightly according to the specification, the only substantial difference is in column 6. Dickens attributes this difference to "either the lack of acuity in NLRB rulings, or of specification error that is influencing the measurement of the effects of the specific violations." Dickens thesis, *supra* note 22, at 106.

HeinOnline -- 79 Nw. U. L. Rev. 731 1984-1985

the union, but a high volume of campaigning. Similarly, if one compares column 2 (all violations—original level of campaigning) with column 5 (all violations—increased level of campaigning), it appears that keeping the violation level constant, while increasing the amount of campaigning, reduced the union's prospects of victory from 25 percent to 4 percent. This, too, suggests that it is the level of employer campaigning, not its characterization as legal or illegal, that affects the union's chances of victory.

In sum, either Dickens' simulation data are too unreliable to be of value, or they lead to the same conclusion as does his Table VII.3—that it is the volume of employer campaigning that influences the union's prospects of victory, not whether that campaigning is legal or illegal. Whichever conclusion one draws, Dickens' simulation data do not undercut our conclusion that illegal campaigning has no greater effect on vote than does legal campaigning, or our recommendation that Board regulation, which exists for the purpose of separating legal from illegal campaigning, should be abandoned.[42]

It is also of interest in assessing the validity of both the Weiler criticisms and the Dickens' reanalysis that the only major empirical study conducted since *Law and Reality* reaches the same conclusions that we did regarding the effect of unlawful campaigning.[43] Professor Laura Cooper obtained access to NLRB files on all elections conducted by one regional office during 1978, 1979, and 1980—a total of 760 elections.[44] For each election NLRB files showed, *inter alia*, the number of authorization cards submitted by the union, whether unfair labor practices were found, and the results of the election.[45] Analyzing these data, Cooper found: (1) no evidence that unions lost a significantly higher proportion of elections when employers committed unfair labor practices than when they did not, regardless of the size of the unit;[46] (2) no evidence that union support declined more between the signing of authorization cards and the election when employers committed unfair labor practices than when they did not, regardless of whether the election outcome was

---

[42] *See* LAW AND REALITY, *supra* note 1, at 139-53. The union victory percentage ranges that Weiler reports, *see* Weiler, *supra* note 6, at 1786, are not found in the simulation table reproduced here. That is because the table reproduced here provides point estimates of the effect of different campaign practices under both the NLRB remedy and specific violations specifications, while Dickens' Table 3, on which Weiler relies, reports confidence intervals of the effect of different campaign practices for the specific violations specification only. Dickens thesis, *supra* note 22, at 108. The two tables differ not at all in the comparative proportion of union victories under each of the seven campaign categories.

[43] 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).

[44] *Id.* at 106-09. Actually, there were 791 elections, but 31 multi-union elections were omitted for purposes of analysis.

[45] *Id.* at 105-08.

[46] *Id.* at 114-16.

HeinOnline -- 79 Nw. U. L. Rev. 732 1984-1985

close.[47] While her study is not without its limits,[48] it nonetheless stands as important empirical support for the conclusions reached in *Law and Reality*. Indeed, Cooper states that her results "substantially replicate the conclusions of the Getman, Goldberg, and Herman study of election behavior."[49]

IV. CONCLUSION

For the past fifty years, the Labor Board has tried to protect employee freedom of choice by limiting what employers may say and do. Its basic theory, supported by Weiler, is that employee vote is vulnerable to manipulation through suggestions of employer reprisals and that employees, because they are economically dependent upon the employer, are likely to apprehend suggestions of coercion in ambiguous employer statements.[50]

It is our conclusion that a policy which seeks to neutralize employer economic power through limitation of communication is basically misguided. There are several reasons why this is so. First, Board regulation is directed to the election and to limiting employer references to its economic power during the pre-election campaign period. Employees, however, do not learn of the employer's economic power or consider the possibility of reprisal for the first time during this period. To the contrary, our data suggest that fear of reprisal has its greatest impact in discouraging employees from seriously considering unionizing prior to the period of the regulated campaign. They know that many employers have resorted to economic reprisals to prevent unionization. Rather than risk such reprisals, many of them decide, as soon as they learn of the union organizing drive, to have nothing to do with the union.

Furthermore, to the extent that employees are susceptible to manipulation or coercion during the campaign based on fear of economic reprisal, there is no difference in impact between that employer speech which is permitted and that which is prohibited. The first amendment and section 8(c) require that an employer be able to state the case against unionization.[51] The typical professionally developed employer campaign

---

47 *Id.* at 115, 117.

48 For example, she points out that more authorization cards might have been signed than were turned in to the Board, *id.* at 107, and that unfair labor practices might have occurred in some elections where no charges were filed. *Id.* at 113-114. Either of these factors would lead to underestimating the effects of unfair labor practices.

49 *Id.* at 140.

50 The vast majority of unlawful statements are not direct threats. For tactical reasons, those who seek to utilize fear seek to convince employees that it is the advent of the union, not the malevolence of the employer, which is the primary danger.

51 "The expressing of any views or argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of the violation of the provisions of this subchapter, if such expressions contain no threat of reprisal or force or promise of benefit." Labor Management Relations Act § 8(c), 29 U.S.C. § 158(c) (1976).

HeinOnline -- 79 Nw. U. L. Rev. 733 1984-1985

involves an effort to suggest harmful consequences without detailing precisely how they will come about. Our data show that the extent to which these statements will be perceived as threats of retaliation depends upon the employees' attitudes and fears, and not upon the specific content of what is said. To those predisposed to perceive threats, a perfectly lawful campaign will be full of efforts to frighten and coerce. To those predisposed to see the employer in a benevolent light, even speeches containing direct threats will be transformed into statements supportive of free choice.

The fact that perceptions of threat do not vary with Board doctrine is not surprising. The fact is that employees do not parse employer documents like literary critics. Indeed, rarely do they focus on their explicit content. Thus, for groups of employees susceptible to coercion, Board regulation of the content of the campaign is meaningless. Some are intimidated before the campaign even begins; others are susceptible to intimidation by campaign propaganda that the Board, constrained by section 8(c) and the dictates of the first amendment, cannot prohibit.

Finally, one result of the current policy of regulating the content of employer speech is that it weakens the argument in favor of allowing unions the opportunity to respond to such speech. As noted earlier, the Board and the courts hardly ever find that a sufficient imbalance in opportunities for organizational communication exists that would permit union access to company premises and the opportunity to respond to employer speech. Yet our data suggest that the union disadvantage in communicating with employees is considerably more of an impediment to the exercise of employee free choice than is the content of the employer campaign. To remedy that disadvantage, shown by *Law and Reality* to be caused primarily by the employer's ability to campaign against union representation on working time and premises, the union should be allowed the opportunity to engage in such campaigning whenever the employer does so.[52] Apart from a gain in the union's ability to make its

[52] Some critics of LAW AND REALITY, albeit not Weiler, have criticized this recommendation on the ground that we found campaign familiarity not to affect voting behavior. These critics assert that if this is so, whatever communications advantage the employer may have is irrelevant, and does not justify a recommendation aimed at increasing employees' familiarity with the union campaign. *See, e.g.*, Miller, *The Getman, Goldberg and Herman Questions*, 28 STAN. L. REV. 1163, 1171-72 (1976).

One response to this criticism is that it overstates our data on lack of campaign effect. While there was no evidence that attendance at company meetings or familiarity with the content of the company campaign were associated with switching to the company, there was evidence that attendance at union meetings and familiarity with the union campaign were associated with switching to the union. There was also evidence that those employees who attended union meetings were typically committed to the union. Hence, the data do justify recommending union access to employees who might vote either company or union, and for whom increased knowledge of the union might be crucial.

Additionally, increased union access to employees must be seen as one element in our total package of recommendations. Our proposal that government regulation of speech be terminated

HeinOnline -- 79 Nw. U. L. Rev. 734 1984-1985

case, such a rule might well have a profound symbolic role in lessening the sense of the employer's absolute power—a crucial element of coercion.

rests, in part, on the expectation that each party will be able to point out to the voters those aspects of the other party's campaign it believes to be untruthful or unfair. Unions will have that ability only if they have the opportunity to communicate on equal terms with the employer. *See* Goldberg, Getman & Brett, *Union Representation Elections: Law and Reality: The Authors Respond To The Critics*, 79 MICH. L. REV. 564, 591-93 (1981); LAW AND REALITY, *supra* note 1, at 90-93, 95-96, 103-07, 156-59.

HeinOnline -- 79 Nw. U. L. Rev. 735 1984-1985