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plaintiff, qualified as discretionary,¹⁸ but a similar release without warning to the person whom the patient had threatened to kill did not.¹⁹

The finding of the district court in the instant case that the decision of the defendant's employees was a discretionary function is one more example of the confusion existing in this area. While some courts have held that once the hospital admits a patient it owes him a duty of care,²⁰ others have indicated that the further question of which course should be taken in treating the patient involves a discretionary function.²¹ In short, it is very difficult to draw the line at which the discretionary exception ceases to operate. It appears likely that the courts will continue to consider this problem on an ad hoc basis, giving paramount attention to the specific facts that gave rise to the injury.

Frank Cross

LABOR LAW—CERTAIN APPEALS TO RACIAL PREJUDICE ARE GROUNDS
FOR SETTING ASIDE A UNION REPRESENTATION ELECTION.

Allen-Morrison Sign Co. (NLRB 1962)

Sewell Manufacturing Co. (NLRB 1962)

Petitioner, a labor union, requested that the National Labor Relations Board set aside the results of an election on the ground that the employer, the Sewell Manufacturing Company, by resorting to appeals to racial prejudice in its campaign to prevent the unionization of its employees, had made a free election impossible.¹ The evidence showed that two weeks before the scheduled election, the employer had mailed to its employees a picture of an unidentified Negro man dancing with an unidentified white lady which was captioned: "THE C.I.O. STRONGLY PUSHES AND ENDORSES F.E.P.C." The employer also sent a reproduction of the front page of a Mississippi newspaper which showed another picture of a white man dancing with a Negro woman; the caption read: "UNION LEADER JAMES B. CAREY DANCES WITH A LADY FRIEND. HE IS PRESIDENT OF THE IUE WHICH SEEKS TO UNIONIZE

18. *Smart v. United States*, 207 F.2d 841 (10th Cir. 1953), *affirming* 111 F. Supp. 907 (W. D. Okla. 1953).

19. *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956).

20. *Grigaluskas v. United States*, *supra* note 9 at 548: "The Army Regulations allow the hospital authorities an exercise of discretion only in determining whether the dependent should be admitted. Once the patient has been admitted, the discretionary function has been completed."; *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950).

21. *Rufino v. United States*, 126 F. Supp. 132, 136 (S.D.N.Y. 1954): "Here, the discretion was exercised, if indeed discretion was involved at all, when it was decided to use insulin therapy." See also *Dugan v. United States*, 147 F. Supp. 674 (D.D.C. 1956).

1. See 61 Stat. 143 (1947), as amended, 29 U.S.C. § 159 (1958), as amended, 29 U.S.C. §§ 159(c) (3), (f)-(h) (Supp. II, 1961), for the principal provisions concerning representation elections.

VICKERS PLANT HERE." Underneath the last mentioned picture was a story headed: "RACE MIXING IS AN ISSUE AS VICKERS WORKERS BALLOT." Subsequently, the employer also sent a letter referring to the use of union money spent "to promote its political objectives such as NAACP and CORE." During the four months preceding the election, the company distributed to its workers copies of the "MILITANT TRUTH," a four page monthly paper published in South Carolina, the theme of which was anti-union and anti-integration.² Finally, the county newspaper covering the election, printed a letter from the National Union to CORE supporting the "freedom ride" project.³ On these facts, the board granted the union's petition for a new election. *Sewell Manufacturing Co.*, 138 N.L.R.B. No. 12 (1962).

In a case decided at the same time as *Sewell*, the Board was again concerned with objections by a union to company conduct during a representation election. The evidence disclosed that the Allen-Morrison Sign Company had sent to its employees a letter dealing with the "problem of racial segregation" and which pointed out the financial assistance the union had given the NAACP. The employer stated in the letter that his purpose was "not to tell you how you ought to feel on integration and segregation, but to let you know how the Unions, including the Textile Union, have tried to force it [segregation] down the throats of the people living in the South." The letter concluded with the story of how the national union prevented the local union in a neighboring town from allocating money for schools operated solely for white children.⁴ Two days before the election, the employer sent another letter to all of its employees attached to which was a newspaper column reprinted from the "MILITANT TRUTH." The article attacked the union and referred to its national officers as "The Big Bosses of TWUA" who operate unions as "Dictatorships from the Top." On these facts, the Board denied the union's request for a new election.⁵ *Allen-Morrison Sign Co., Inc.*, 138 N.L.R.B. No. 11 (1962).

The right to review the conduct of a representation election rests solely with the National Labor Relations Board. Since Congress, through the National Labor Relations Act, imposed upon the Board the control

2. In the April 1961 issue is this statement of the publication's beliefs: MILITANT TRUTH has been published as an independent voice for more than twenty years, proclaiming the gospel message, true to the Bible as God's Holy Work; supporting free, constitutional Americanism; opposing modernism; socialism, communism and all other ideologies which undermine and destroy the Christian faith and constitutional government in this great Republic.

MILITANT TRUTH believes in FREE America. We believe in private enterprise. We believe in private capitalism. We believe in the American wage earner. We would protect him from oppression and exploitation either from management, from government bureaucracy, or from power-drunk labor union monopolies.

3. Haralson County Tribune, July 13, 1961.

4. Local 371 of the TWUA was prevented by the union from purchasing bonds to help finance segregated schools in Front Royal, Va.

5. The election in the *Sewell* case was held on July 21, 1961, at Breman and Temple, Georgia where the employer's plants were located. The election in the *Allen-Morrison* case was held in Lynchburg, Virginia, on the same date. Would the Board have reached the same result if the Election had been held in New York City? In Harlem?

over elections, this power necessarily conveys with it an inherent duty to maintain the integrity of the election process.⁶ The Board has stated that in election proceedings its function is 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."⁷ When standards of conduct fall below a certain minimum, the Board will set aside the results and order another vote. The Board has found it necessary to cancel the results of an election when the evidence showed promises of benefits just prior to the voting,⁸ threats of economic reprisals,⁹ deliberate misrepresentations of material facts by an employer or a union,¹⁰ deceptive campaign tactics,¹¹ or a general atmosphere of fear and confusion created by one of the competing parties or even by a member of the general public.¹² Although the Board may set aside an election which involves an unfair labor practice, it is also clear that this condition is not necessary.¹³ It should be noted, however, that when speech is the conduct complained of the Board has recognized the privileges enumerated in § 8(c)¹⁴ of the National Labor Relations Act and has generally refused to set aside an election in the absence of an unfair labor practice,¹⁵ except where there has been a deliberate misrepresentation of a material fact or a violation of the *Peerless* rule.¹⁶ The Board, in the present cases, seems to have carved out another exception consisting of certain appeals to racial prejudice.

Standards fixed by the Board in the area of election conduct have generally been heightened over the years. The *Sharney*¹⁷ case was the first

6. P. D. Gwaltney, Jr., & Co., 74 N.L.R.B. 371 (1947). General Shoe Corporation, 77 N.L.R.B. 124 (1948). See also 61 Stat. 140, as amended, 29 U.S.C. § 157 (1958).

7. General Shoe Corp., *supra* note 6 at 127.

8. International Shoe Co., 123 N.L.R.B. 682 (1959); Matter of Hudson Hosiery Co., 72 N.L.R.B. 1434 (1947).

9. Shovel Supply Co., 121 N.L.R.B. 1485 (1958).

10. United States Gypsum Co., 130 N.L.R.B. 901 (1961).

11. The Gummed Products Co., 112 N.L.R.B. 1092 (1955).

12. Heinz Division, Kelsey-Hayes Company, 126 N.L.R.B. 151 (1960).

13. "Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." General Shoe Corp., *supra* note 6 at 126. See 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958). See also *NLRB v. United Steelworkers of America and Nutone, Inc.*; *NLRB v. Avondale Mills*, 357 U.S. 357, 78 S. Ct. 1268 (1958).

14. 61 Stat. 140 (1947), 29 U.S.C. § 158(c) (1958): "The expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. See also *NLRB v. United Steelworkers of America and Nutone, Inc.* *supra* note 13; *NLRB v. Avondale Mills*, *supra* note 13.

15. 25 NLRB Ann. Rep. 50-52 (1960).

16. *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953). Here the Board stated: "Accordingly, we now establish an election rule which will be applied in all elections cases. This rule shall be that employers and Unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Violation of this will cause the election to be set aside whenever valid objections are filed."

17. *Sharney Hosiery Mills*, 120 N.L.R.B. 750 (1958).

in which the Board was faced with conduct aimed solely at racial matters in an election campaign. The action arose out of the course of a representation election between the Textile Workers Union and a hosiery mill. Two weeks before the election, the employer mailed to the employees a letter which discussed the union's position on the issue of racial integration. It stated that the union was strongly integrationist, had submitted a brief supporting integration before the United States Supreme Court, and was striving to eliminate segregation from every phase of American life. It pointed out that the union was a member of the AFL-CIO which, at its last convention, had contributed seventy-five thousand dollars to the NAACP. Noting that there was no "misrepresentation, fraud, violence, or coercion" and that the statements were temperate and factually correct, the Board found no basis for setting aside the results of the election. The Board further justified its decision by referring to its position in the past of not attempting to strictly limit campaigning in respect to election propaganda but, instead, of relying "on the good sense of the voters to evaluate the statements of the parties."¹⁸ Subsequently, the Board cited the *Sharney* case as authority for the principle that "while it [the Board] does not condone appeals to prejudice, the mere mention of a racial or religious issue is not grounds for setting aside an election." Objections based solely on such a claim were repeatedly struck down.¹⁹ It should be pointed out, however, that in these latter cases the appeals to racial bigotry were casual and not part of a deliberate plan, as in *Sharney*.²⁰ It was not until the *Sewell* and *Allen-Morrison* cases that conduct similar to that in *Sharney* appeared again.

Using these three cases as a guide, a standard may be suggested to judge whether particular conduct will warrant invalidating an election. The Board, itself, pointed out in the *Sewell* case:

We take it as datum that prejudice based on color is a powerful emotional force. We think it also indisputable that a deliberate appeal to such prejudice is not calculated to encourage the reasoning faculty.²¹

Nevertheless, certain appeals to prejudice — characterized by the Board as mere prattle or puffing — although not approved or condoned, will still be tolerated as an inevitable part of electoral campaigning and left to the

18. *Id.* at 751.

19. 25 NLRB Ann. Rep. 50-53 (1960); Paula Shoe, 121 N.L.R.B. 673 (1958); Chock Full O'Nuts, 128 N.L.R.B. 1296 (1958); Sharney Hosiery Mills, 120 N.L.R.B. 750 (1958); Westinghouse Electric Corp., 119 N.L.R.B. 117 (1957). It should be noted that in the *Westinghouse* case, Chairman Leedom did state: "The consequence of injecting the racial issue where racial prejudices are likely to exist is to pit race against race and thereby distort a clear expression of choice on the issue of unionism. Clearly, to draw the issues along these lines does not effectuate the policies of the Act. The implications are far greater, in my opinion, than the reaches of the Act, for they bespeak an assault upon the spirit of our Constitution. Cf. *Sovern, The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962).

20. In Paula Shoe *supra* note 19, the Board refused to set aside an election when the union in a pamphlet referred to the plant manager as "that Jew." In the *Chock Full O'Nuts* case, *supra* note 19, a Negro vice president stated that the "Union had been brought in because white employees were jealous of his position . . ."

21. 138 N.L.R.B. No. 12 at 7.

good sense of the electorate for proper evaluation. Racial appeals of the kind and intensity as found in *Sewell* cannot be said to be mere prattle. Such appeals were deliberate and intensive, created a condition which made impossible a sober, informed exercise of the voting franchise, and had no purpose except to inflame the racial feelings of the voters. The Board found that the employer's propaganda "so inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility."²² The photograph of Carey and the attached newspaper story were not pertinent to any legitimate issue involved and were introduced solely to create an emotional hostility to the union. Contrast this with the Board's findings in the *Allen-Morrison* case:

The Employer's own letter was temperate in tone and advised the employees as to certain facts concerning union expenditures to help eliminate segregation. The excerpt from "Militant Truth" concerned action taken by the Union in a nearby city. We are not able to say that the Employer in this case resorted to inflammatory propaganda on matters in no way related to the choice before the voters, and we therefore decline to set the election aside.²³

Therefore, racial appeal may be classified into two types. Where the matter is presented in an objective manner and is temperate and truthful in content and relevant to the issues involved in the election, such speech will be tolerated as being information to which parties are entitled to have knowledge. On the other hand, where the matter, although not libelous, slanderous or fraudulent in content, is presented in a manner and for the sole purpose of inflaming the employees, the affected election will generally be set aside.

A further question involves the constitutionality of setting aside representation elections on the ground of the introduction of excessively inflammatory racial appeals. In an ordered society few rights are absolute. For instance, the United States Supreme Court, in discussing alleged violations of first amendment freedoms by the operation of the Hatch Act²⁴ which prohibited certain political activity by government employees, declared:

Of course, it is accepted constitutional doctrine that these fundamental rights are not absolutes. . . . The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery.²⁵

22. *Id.* at 8.

23. 138 N.L.R.B. No. 11 at 4. Member Brown dissented, stating that the employer had here also exceeded the bounds of permissible campaigning tactics.

24. 18 U.S.C. §§ 61, 61h, 61o (1958). *Cf.* Jud. Code, § 274d, 28 U.S.C. § 400 (1958).

25. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 95, 67 S. Ct. 556, 567 (1947).