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A Survey: NLRB Limits On Appeals to Racial Prejudices of Employees

By John P. Campbell*

Appeals by an employer to the racial prejudices of its employees may be an unfair labor practice in violation of section 8(a)(1)[1] of the National Labor Relations Act (Act).[2] This section makes it unlawful for an employer "to interfere with, restrain, or coerce" employees in the exercise of their rights, under section 7[3] of the Act, "to form, join, or assist labor organizations," or to refrain from doing so. Racial appeals by either an employer or a union may also be grounds for setting aside an election conducted by the National Labor Relations Board (Board) if, as determined according to Board standards spelled out in 1962,[4] the appeals taint the "laboratory conditions"[5] in which elections are to be conducted under section 9[6] of the Act. While section 8(c)[7] of the Act, the "free speech" provision, offers some protection to an employer's non-coercive

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1. 29 U.S.C. § 158(a)(1) (1976).

2. The present National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), had its beginning with the National Labor Relations (Wagner) Act, Pub. L. No. 198, 74 Stat. 449 (1935). The 1935 Act was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136. The Act was further amended by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519. A final amendment was Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395. All subsequent references will be to "the Act" unless otherwise specified.

3. 29 U.S.C. § 157 (1976).

4. Sewell Mfg. Co., 138 N.L.R.B. 66, 50 L.R.R.M. 1532 (1962); Allen-Morrison Sign Co., 138 N.L.R.B. 73, 50 L.R.R.M. 1535 (1962).

5. General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948).

6. 29 U.S.C. § 159 (1976).

7. 29 U.S.C. § 158(c) (1976), which provides in part that the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

statements on racial issues, this section applies only in unfair labor practice cases arising under section 8. It does not prevent the Board from finding, in representation election cases arising under section 9, that an employer's statements, even though protected by section 8(c), interfered with "laboratory conditions," thus requiring the results of an election to be set aside.[8] This article surveys the Board's treatment of appeals to racial prejudices as either unfair labor practices or as grounds for setting aside elections.

I. Racial Appeals as Unfair Labor Practices

Even before the enactment of section 8(c) as part of the Taft-Hartley Act[9] in 1947, the Board held unlawful racially prejudiced statements and actions of employers which threatened reprisals or promised benefits. Indeed, prior to 1947 the Board applied a broad standard which sought to insulate employees from "each subtle expression of hostility upon the part of one whose good will is so vital to [them], whose power is so unlimited, whose action is so beyond appeal,"[10] even in those cases in which the employer expressions did not threaten reprisals or promise benefits. Applying this broad standard, the Board found unlawful interference, restraint or coercion in cases in which an employer threatened to discharge Negro employees if the union won;[11] or told white employees that they would be replaced by minorities if the union won;[12] or told white employees they would have to work with minorities if the union won.[13] Similarly, the Board found unlawful interference, restraint or coercion in cases in

8. Metropolitan Life Ins. Co., 90 N.L.R.B. 935, 938, 26 L.R.R.M. 1294, 1295 (1950); General Shoe Corp., 77 N.L.R.B. 124, 126, 21 L.R.R.M. 1337, 1341 (1948).

9. Labor Management Relations (Taft-Hartley) Act, 1947, § 8(c), Pub. L. No. 101, 61 Stat. 136, 142 (codified at 29 U.S.C. § 158(a)(1) (1976)).

10. Wheeling Steel Corp., 1 N.L.R.B. 699, 709, 1 L.R.R.M. 44 (1936), *enforced cease and desist order per curiam*, 94 F.2d 1021 (6th Cir. 1938), *enforced remedy per curiam*, 101 F.2d 1023 (6th Cir. 1939).

11. E. Bigelow Co., 52 N.L.R.B. 999, 1006, 13 L.R.R.M. 66 (1943), *enforced per curiam*, 14 L.R.R.M. 954 (6th Cir. 1944) ("I have been told, through reliable sources, that if the union goes into effect, that will be all of it for the niggers."); Fred A. Snow Co., 41 N.L.R.B. 1288, 1293, 10 L.R.R.M. 159 (1942) ("[I]f the Union came into the shop, [the president] would turn the plant over to his son who would not have any colored workmen . . . .").

12. Edinburg Citrus Ass'n., 57 N.L.R.B. 1145, 1156, 14 L.R.R.M. 271 (1944), *enforcement denied*, 147 F.2d 353 (5th Cir. 1945) ("If the CIO comes in the Mexicans will soon have your job.").

13. Reeves Rubber, Inc., 60 N.L.R.B. 366, 371, 15 L.R.R.M. 232 (1945), *enforced*, 153 F.2d 340 (9th Cir. 1946) (If the plant "was successfully organized, it 'would be run by Negroes from Los Angeles and Mexicans from San Juan Capistrano.' "); S. K. Wellman Co., 53 N.L.R.B. 214, 222, 13 L.R.R.M. 97 (1943) ("[I]f the CIO got in the plant, it would be fulla negroes.").

which an employer prevented contact between Negro employees and white union organizers;[14] disparaged white employees for associating with Negroes;[15] misrepresented a union's attitude toward minorities;[16] and used racially derogatory terms.[17]

Since the enactment of section 8(c) in 1947, the Board has found no violations of section 8(a)(1) in cases in which an employer only publicized a union's position on racial matters and predicted adverse consequences if the employees voted in the union and did not threaten reprisals or promise benefits within the employer's power to effectuate. For example, in *General Shoe Corp.*, [18] decided in 1948, the employer's president read a pre-election speech which charged the union with "publicly [taking] the stand that white people and negroes should be on an equal basis" in the work place and with failing to tell the employees "everything they [unions] advocate."[19] The Board held that although these statements "undeniably were calculated to influence the rank-and-file employees in their choice of a bargaining representative," the statements "contained no

14. Ozan Lumber Co., 42 N.L.R.B. 1073, 1079, 10 L.R.R.M. 217 (1942); American Cyanamid Co., 37 N.L.R.B. 578, 585-86, 9 L.R.R.M. 233 (1941).

15. Rapid Roller Co., 33 N.L.R.B. 557, 567-68, 8 L.R.R.M. 284 (1941), *aff'd*, 126 F.2d 452 (7th Cir.), *cert. denied*, 317 U.S. 650 (1942) (employer requested white union shop committee members to remove a Negro member); Planters Mfg. Co., 10 N.L.R.B. 735, 744, 3 L.R.R.M. 464 (1938), *enforced*, 105 F.2d 750 (4th Cir. 1939) (employer criticized a white employee for joining a union which admitted Negroes).

16. South Texas Produce Co., 66 N.L.R.B. 1442, 1455, 17 L.R.R.M. 415 (1946), *enforced sub nom.* NLRB v. Whittenberg, 165 F.2d 102 (5th Cir. 1947)(false releases issued by employer stating that union leaders "refused to work with Latin-American packers"). *See also* California Cotton Oil Corp., 20 N.L.R.B. 540, 548, 6 L.R.R.M. 12 (1940) (Negro employees told that "the colored men would never have equal rights with the white men in the A. F. of L. or any other union"); Arcade-Sunshine Co., 12 N.L.R.B. 259, 263, 4 L.R.R.M. 139 (1939), *modified and enforced*, 118 F.2d 49 (D.C. Cir. 1940), *cert. denied*, 313 U.S. 567 (1941) (employer told Negro employees "what I knew about the former attitude of the [union] . . . towards negroes, which had not been friendly").

17. California Cotton Oil Corp., 20 N.L.R.B. 540, 553, 6 L.R.R.M. 12, 13 (1940) (employer told white employees that a union organizer was a "no-good nigger"). Subsequent to the enactment of section 8(c) in 1947, the Board has shown greater tolerance for racial slurs and similar disparaging remarks. *See, e.g.*, Chrysler Airtemp South Carolina, Inc., 224 N.L.R.B. 427, 429, 92 L.R.R.M. 1636 (1976) (foreman said "the niggers" would force the plant to close if the union won); Swift Textiles, Inc., 214 N.L.R.B. 36, 88 L.R.R.M. 1371, 1373 (1974) (supervisor said "the niggers" would run the union); Booth, Inc., 190 N.L.R.B. 675, 681-82, 77 L.R.R.M. 1322, 1324 (1971) *enforced*, 457 F.2d 511 (5th Cir. 1972) (employer characterized black employees as "stupid" or "ignorant" "Nigras"); Boyce Mach. Corp., 141 N.L.R.B. 756, 761 n.9, 52 L.R.R.M. 1393 (1963) (employer described union representative as a "goddamn Dago"); General Shoe Corp., 77 N.L.R.B. 124, 128, 21 L.R.R.M. 1337, 1338 (1948) (employer told employees that union organizer "is not really named Burke, but Berg, a Jewish man from Brooklyn").

18. 77 N.L.R.B. 124, 21 L.R.R.M. 1337 (1948).

19. *Id.* at 137, 21 L.R.R.M. at 1338.

threat of reprisal or promise of benefit and appear to be only such expressions of opinion as are excluded from our consideration in an unfair labor practice case by reason of section 8(c) of the amended Act."[20]

In subsequent cases, the Board continued to find no section 8(a)(1) violations in situations in which the employers' statements did not threaten employer action and only either predicted the effect which a union might have on the racial make-up of the work force *or* pointed out that a union had taken certain positions on racial issues. In *Snap Out Binding & Folding, Inc.*,[21] an employer lawfully pointed out that unions generally tended to exclude minorities.[22] In *Bonwit Teller, Inc.*,[23] when one union sought to organize a predominantly black department and a second union sought to organize a racially integrated store-wide unit, the employer lawfully accused the first union of attempting to "segregate" the work place and campaigned in favor of an integrated store-wide unit.[24] In *Glazers Wholesale Drug Co.*,[25] a Chicano supervisor lawfully told Chicano employees they should stick together because if the union won, "the blacks would take over," "run out the Chicanos and leave nothing but blacks."[26] In *Swift Textiles, Inc.*,[27] a supervisor lawfully predicted that if the union won the election, the union would have a black president and "the niggers will run it."[28] In *Chrysler Airtemp South Carolina, Inc.*,[29] a foreman stated that "the damn niggers will have the plant closed" if the union won, and this statement was held to be a lawful prediction of a strike by employees rather than a threat of a shutdown by the employer.[30]

Yet, the Board has found section 8(a)(1) violations when employers directly or indirectly threatened to replace employees of one race with employees of another race if a union won. In *Bibb Manufacturing Co.*,[31] a

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20. *Id.* at 125, 21 L.R.R.M. at 1337. The statements were held to be objectionable and the election victory of the employer was set aside.

21. 166 N.L.R.B. 316, 65 L.R.R.M. 1617 (1967).

22. The trial examiner, in this 1967 decision, stated that it was a "notorious fact" that many unions excluded minorities. *Id.* at 327.

23. 170 N.L.R.B. 399, 68 L.R.R.M. 1203 (1968).

24. *Id.* at 405, 68 L.R.R.M. at 1204. *See also* Coca-Cola Bottling Co. 210 N.L.R.B. 706, 710, 86 L.R.R.M. 1669, 1670 (1974), in which a supervisor lawfully defended the employer's fairness to minorities when a black employee complained of prejudice.

25. 209 N.L.R.B. 1152, 86 L.R.R.M. 1161 (1974).

26. *Id.* at 1154, 86 L.R.R.M. at 1162. The Board noted that the statements might well be grounds for setting aside an election.

27. 214 N.L.R.B. 36, 88 L.R.R.M. 1371 (1974).

28. *Id.* at 36, 88 L.R.R.M. at 1372. The Board held that the supervisor's remarks did not threaten employer action.

29. 224 N.L.R.B. 427, 92 L.R.R.M. 1636 (1976).

30. *Id.* at 429.

31. 82 N.L.R.B. 338, 23 L.R.R.M. 1557 (1949), *modified on other grounds*, 188 F.2d 825 (5th Cir. 1951).

foreman's remark that an employee could join the union if he "wanted to work with Negroes" was held to be an unlawful threat that the employer would place blacks in jobs previously reserved for whites.[32] In *Babcock & Wilcox Co.*,[33] it was held that an unlawful threat was made when a supervisor told black employees that if the union won, "you colored boys won't have a job."[34] *Granwood Furniture Co.*[35] involved an unlawful threat by a foreman who told black employees that they would be replaced with whites if the union won. Further, in *Associated Grocers, Inc.*,[36] the Board found an unlawful threat when an employer placed a want-ad for white employees just before the predominantly black unit narrowly voted down the union.[37]

The Board found an unlawful threat in *Boyce Machinery Corp.*,[38] which involved a supervisor who told employees that the union would "have all you colored boys off these welding machines" and "would replace the Negro employees with whites."[39] In *Certain-Teed Products Corp.*,[40] black and white employees were separately and unlawfully threatened that they could be replaced by employees of the other race if the union won. Finally, in *Kay Corp.*,[41] the Board considered unlawful a supervisor's threat to white employees that black people would have to be hired to achieve a racial balance if the union won.

In several early cases decided shortly after the enactment of section 8(c), the Board held that employer statements to the effect that white employees would be working side-by-side with blacks if a union won were not unlawful.[42] However, in subsequent cases, the Board found violations

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32. *Id.* at 377, 23 L.R.R.M. at 1567. Since the employer did not file exceptions to the trial examiner's decision, the Board adopted it pro forma.

33. 128 N.L.R.B. 239, 46 L.R.R.M. 1293 (1960).

34. *Id.* at 244-45.

35. 129 N.L.R.B. 1465, 1471, 47 L.R.R.M. 1237 (1961).

36. 134 N.L.R.B. 468, 470, 49 L.R.R.M. 1242 (1961).

37. The conduct was also held to be objectionable as creating a "reign of terror" which instilled fear in the black employees that they could easily be replaced. *Id.* at 480.

38. 141 N.L.R.B. 756, 52 L.R.R.M. 1393 (1963).

39. *Id.* at 761, 52 L.R.R.M. at 1395. The Board viewed the supervisor's statements as threats that the employer would yield to demands the union would make concerning replacement of blacks with whites.

40. 153 N.L.R.B. 495, 59 L.R.R.M. 1455 (1965).

41. 209 N.L.R.B. 11, 85 L.R.R.M. 1574 (1974).

42. American Thread Co., 84 N.L.R.B. 593, 601, 24 L.R.R.M. 1334 (1949), *enforced per curiam*, 188 F.2d 161 (5th Cir. 1951) ("[T]he Company wouldn't be the same [if the union won] . . . we would be working side by side with negroes and sharing the same rest room with them . . . .") *See* Happ Bros. Co., 90 N.L.R.B. 1513, 1533, 26 L.R.R.M. 1356 (1950), *enforcement denied*, 196 F.2d 195 (5th Cir. 1952) ("[I]f you all get the Union up here, you'll be sitting up here by niggers."). *See also* Model Mill Co., 103 N.L.R.B. 1527, 1534, 32 L.R.R.M. 1001, 1002 (1953), *enforced per curium*, 210 F.2d 829 (6th Cir. 1954) (employer called a meeting and had a black employee sit in the president's chair as an illustration of

when employers told employees that a union victory would mean integration of a segregated work force. The Board reasoned that although such statements could probably not be viewed as threats to displace employees of one race with employees of another race, the statements were unlawful because they threatened to impose working conditions which certain employees might consider onerous. For example, in *Empire Manufacturing Co.*,[43] the employer unlawfully told employees that if the union won, they "would do as up North, hire niggers and put them on machines with you." Further, in *Petroleum Carrier Corp.*,[44] a supervisor unlawfully told employees that if the union won, he would employ anybody he could, "nigger, cajun, wop, or whatnot."

There need not be a *verbal* statement by the *employer* before a violation can be found. In *Durant Sportswear*,[45] the employer unlawfully displayed a poster of a black person saying to a white person, "the President and the Union man says we'uns must work with you white folk."[46] Further, violations are found when threats or unlawful predictions are made by an agent of the employer. In *Atkins Saw Division, Borg-Warner Corp.*,[47] supervisors unlawfully told white employees that if the union won, all employees would have to use the same rest rooms and drinking fountains.[48] In *General Steel Products, Inc.*,[49] a foreman unlawfully told white employees that the employer was planning to install ten new machines and that "if the Union did come in, the niggers would be operators of them."[50]

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the effect the union might have). *See generally* Burns Brick Co., 80 N.L.R.B. 389, 402, 23 L.R.R.M. 1122 (1948) (employer predicted race riots if black employees voted in a union).

43. 120 N.L.R.B. 1300, 1307-08, 42 L.R.R.M. 1153, 1154, *enforced*, 260 F.2d 528 (4th Cir. 1958).

44. 126 N.L.R.B. 1031, 1035, 45 L.R.R.M. 1442 (1960).

45. 147 N.L.R.B. 906, 56 L.R.R.M. 1365 (1964).

46. *Id.* at 914, 56 L.R.R.M. at 1365. The campaign took place shortly after President Kennedy's efforts to integrate the University of Mississippi. The trial examiner held that the poster told white employees that if the union or the federal government demanded integration of the work force, the employer would agree, a threat to white employees of loss of job tenure or less pleasant working conditions. *Id.* at 914, 916-18. The Board affirmed the violation as "cumulative" without reaching the basis for it. *Id.* at 907 n.1.

47. 148 N.L.R.B. 949, 57 L.R.R.M. 1097 (1964).

48. The trial examiner reasoned that the statements threatened white employees with changed working conditions involving enforced association with blacks if the union won. *Id.* at 954-55, 57 L.R.R.M. at 1097. The Board affirmed without discussion. *Id.* at 950, 57 L.R.R.M. at 1098.

49. 157 N.L.R.B. 636, 61 L.R.R.M. 1417 (1966), *enforced in pertinent part*, 398 F.2d 339 (4th Cir. 1968), *reversed and remanded in other respects sub nom.* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

50. 157 N.L.R.B. at 639, 61 L.R.R.M. at 1420. *See also* Kay Corp., 209 N.L.R.B. 11, 13, 85 L.R.R.M. 1574, 1575 (1974) (supervisor unlawfully threatened that white employees would have to work alongside blacks if the union won).

A final example illustrates that even subtle and indirect threats are unlawful. In *Bush Hog, Inc.*,[51] the Teamsters Union attempted to organize a unit of white employees in Selma, Alabama shortly after Martin Luther King, Jr. made the famous "Freedom March" from Selma to Montgomery. The employer reminded employees that Jimmy Hoffa, then president of the Teamsters Union, had contributed twenty-five thousand dollars to the "Freedom March." Furthermore, company supervisors intimated that while the employer would preserve a segregated work force, a union victory would mean the end of segregation. The racial theme of the campaign was underscored by a poster of a fat black man smoking a cigar and saying, "Us and that Union are going to change things around here." The Board's trial examiner found that the employer unlawfully threatened an undesirable change in working conditions involving enforced employment of blacks and unlawfully promised to resist integration if the union lost.[52] The Board agreed. In enforcing the Board's order, the Fifth Circuit noted that although the reminder that Hoffa had donated Teamsters funds to the "Freedom March" might be protected free speech considered in isolation, when taken in the context of the campaign, the employer's statement clearly implied a promise to preserve a segregated work force if the union lost. The court held that the speech was unprotected by section 8(c) because it amounted to an unlawful promise of something the white work force considered a benefit.[53]

II. Racial Appeals As Grounds For Setting Aside Elections

The Board articulated its standard for determining whether an election should be set aside because of appeals to the racial prejudices of employees in the companion cases of *Sewell Manufacturing Co.*[54] and *Allen-Morrison Sign Co.*,[55] decided in 1962. Since 1962, application of the *Sewell* and *Allen-Morrison* standard has resulted in only two reported decisions setting aside elections based on resort to racial appeals, one setting aside an employer's victory[56] and one setting aside a union's victory.[57] Let us look first at the reported decisions prior to 1962 in which elections were set aside for similar reasons.

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51. 161 N.L.R.B. 1575, 63 L.R.R.M. 1501 (1966), *enforced*, 405 F.2d 755 (5th Cir. 1968).
52. 161 N.L.R.B. at 1592-93, 63 L.R.R.M. at 1501-02.
53. 405 F.2d at 757 n.2.
54. 138 N.L.R.B. 66, 50 L.R.R.M. 1532 (1962).
55. *Id.* at 73, 50 L.R.R.M. at 1535.
56. Universal Mfg. Corp., 156 N.L.R.B. 1459, 61 L.R.R.M. 1258 (1966). *See* text accompanying note 79 *infra*.
57. NLRB v. Schapiro & Whitehouse, Inc., 356 F.2d 675 (4th Cir. 1966). *See* text accompanying note 104 *infra*.

A. Cases Prior to Sewell and Allen-Morrison

In *P.D. Gwaltney, Jr. & Co.*,[58] a 1947 decision, the union sought to organize a predominantly black work force at a plant in a small Virginia town. The employer, the local press, the sheriff and other public officials campaigned against the union by threatening a Ku Klux Klan resurgence if the union won. A speaker at a large public meeting stated: "In 1866 flaming crosses burned on Southern hillsides; hooded figures galloped through the night striking terror to the hearts of Negroes, 'carpetbaggers' and 'scalawags' alike . . . . Gentlemen, a current drive by the Communist supported [union] may raise the cry: 'The Klan Rides Again.' May God forbid this."[59] The Board set aside the results of the election won by the employer, holding that under such circumstances, employee freedom of choice was impossible.

An employer's veiled threat to the job security of black employees required the setting aside of the employer's election victory in *Southern Car & Manufacturing Co.*,[60] a 1953 decision, in which the employer told black employees that "[a]t present, we have approximately 75% colored employees and 25% white and it will remain that way because I want it to. However, if I did not want it that way it could easily be changed to 75% to 90% white and 10% to 25% colored."[61] Similarly, in a 1961 decision,[62] when an employer ran a want-ad for white employees just before the election in a predominantly black unit and had the whites fill out applications forms within sight of the blacks, the "reign of terror"[63] created by the employer threatened black employees with replacement by whites if the union won. This threatening act by the employer required the election, narrowly won by the employer, to be set aside. But a union's statement that the employer would lay off all black employees if the union did not win the election did not require the union's election victory to be set aside in *Kresge-Newark, Inc.*,[64] because the statement, even though directed at black employees, was not a threat within the power of the union to carry out and the employees were deemed capable of evaluating the union's statement as ordinary campaign propaganda.

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58. 74 N.L.R.B. 371, 20 L.R.R.M. 1172 (1947).

59. *Id.* at 376, 20 L.R.R.M. at 1173.

60. 106 N.L.R.B. 144, 32 L.R.R.M. 1418 (1953).

61. *Id.* at 145-46, 32 L.R.R.M. at 1418.

62. Associated Growers Inc., 134 N.L.R.B. 468, 49 L.R.R.M. 1242 (1961).

63. *Id.* at 480. This conduct also violated section 8(a)(1). *See* notes 36-37 and accompanying text, *supra*. *See also* Media Mailers, Inc., 191 N.L.R.B. 251, 77 L.R.R.M. 1393 (1971), a case decided after *Sewell* and *Allen-Morrison*, in which the Board set aside an employer's victory when the employer threatened that a union victory would be detrimental to the future employment opportunities of both males and females.

64. 112 N.L.R.B. 869, 36 L.R.R.M. 1116 (1955).

Yet, in three decisions in which employers informed employees of the union's position on integration and hinted at the possible ramifications, the statements were held insufficient to warrant setting aside elections won by the employers. In *Westinghouse Electric Corp.*,[65] the employer did not interfere with the election when white employees were told that if the union won the election, "promotions would be by seniority regardless of color."[66] In *Mead-Atlanta Paper Co.*,[67] the employer did not interfere with the election when black employees were told that "a number of unionized plants in the area had a lower ratio of Negroes to whites" than was the case at the employer's plant.[68] Finally, in *Sharnay Hosiery Mills, Inc.*,[69] the employer did not interfere with the election when white employees were told that the union favored integration, had filed a pro-integration brief in school desegregation cases before the Supreme Court, wanted to eliminate segregation from all phases of American life, and was a member of the AFL-CIO, which had contributed seventy-five thousand dollars to the NAACP. The Board upheld the election results, noting that the employer's statements were "temperate and factually correct," and rejected the union's contention that mention of a racial issue in a campaign should be automatic grounds for setting aside an election.[70]

B. Sewell and Allen-Morrison

In *Sewell Manufacturing Co.*, the employer distributed campaign literature equating unionism with communism, atheism and race-mixing. Two weeks before the election at its plants in small Georgia towns, the employer mailed its employees pictures of a black man dancing with a white woman and of a white man dancing with a black woman. Both pictures

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65. 118 N.L.R.B. 364, 40 L.R.R.M. 1191 (1957), *motion to reconsider denied*, 119 N.L.R.B. 117, 41 L.R.R.M. 1005 (1957).

66. 118 N.L.R.B. at 368, 40 L.R.R.M. at 1192.

67. 120 N.L.R.B. 832, 42 L.R.R.M. 1053 (1958).

68. *Id.* at 833, 42 L.R.R.M. at 1054.

69. 120 N.L.R.B. 750, 42 L.R.R.M. 1036 (1958).

70. *Id.* at 751, 42 L.R.R.M. at 1036. Sharnay Hosiery Mills, Inc. was cited as authority for rejecting a union's objection to an employer's election victory in Chock Full O'Nuts, 120 N.L.R.B. 1296, 42 L.R.R.M. 1152 (1958), in which the employer's black vice-president told black employees that he was the reason for the union activity and that white employees were jealous of his position. Both decisions were cited as authority in Paula Shoe Co., 121 N.L.R.B. 673, 675, 42 L.R.R.M. 1419 (1958) for rejecting an employer's objection to a union's victory. The union's handbill distributed the day before the election argued that the employees should vote for the union if they wanted to avoid mistreatment by "that . . . Jew Sandler." The Board held that the mere mention of a racial or religious issue is not grounds for setting aside an election. *See also* Kay Manufacturing Corp., 121 N.L.R.B. 1077, 1078-79, 42 L.R.R.M. 1526, 1527 (1958) (union representative's statement that "Negroes in the South were too afraid of their jobs and that the white trash was too stupid to vote for the union" was held as too isolated to warrant setting aside the election won by the union).

bore captions linking unions with integration. Two days before the election, the employer's president mailed the employees a letter setting out his reasons for voting against the union. One reason offered was that he "would object to paying assessments so the union can promote its political objectives such as the National Association for the Advancement of Colored People, and the Congress of Racial Equality."[71]

The union filed objections to the employer's election victory on the grounds that the employer's appeals to racial prejudice prevented a free election. The Board sustained the objections, holding that the employer's racial propaganda had

> 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 . . . . The Employer calculatedly embarked on a campaign so to inflame racial prejudice of its employees that they would reject [the union] out of hand on racial grounds alone.[72]

The Board then set forth the standard by which racial appeals are to be measured:

> So long, therefore, as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.[73]

This standard was applied in *Allen-Morrison Sign Co.*, decided the same day. The employer mailed a truthful letter to its employees at its plant in Virginia which included the following regarding racial matters:

> Another thing for you to consider is a problem which has existed in the South for many years to which there has been no good answer. That is the question of racial segregation. Whether you believe in segregation or integration of white and colored schools, swimming pools, plants and other places is a question for you to decide and each person is entitled to his own view. The Company considers this a matter for each individual to decide. The national unions on the other hand have taken the view that they are supposed to decide the question of segregation or integration and they have actively promoted integration.[74]

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71. 138 N.L.R.B. at 67, 50 L.R.R.M. at 1532.
72. *Id.* at 72, 50 L.R.R.M. at 1535.
73. *Id.* at 71-72, 50 L.R.R.M. at 1535 (footnote omitted, emphasis in original).
74. 138 N.L.R.B. at 73, 50 L.R.R.M. at 1536.

The letter also pointed out that the union was using dues money to promote integration; that the union had called for the elimination of school segregation immediately rather than gradually; that "where unions have their way, there is no segregation" in the work place; and that the union made a contribution from dues to the NAACP.[75] The letter concluded by saying that its purpose was not to tell the employees how they ought to feel about integration, "but to let you know how the unions . . . have tried to force it down the throats of the people living in the South."[76] The Board refused to set aside the election, holding that, under the *Sewell* standard,

> 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 [newspaper article] concerned action taken by the Union in this case 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.[77]

The Board's *Sewell* and *Allen-Morrison* standard tolerates the injection of racial issues into an election campaign when the party injecting the issues limits its comments to truthful statements of the other party's position and does not deliberately stress racial feelings by appeals which reduce the election to a vote on racial questions alone. The standard places the burden on the party injecting racial issues to establish that they were truthful and germane to election issues.

C. *Application of the Sewell and Allen-Morrison Standard*

As previously indicated,[78] application of the *Sewell* and *Allen-Morrison* standard since 1962 has resulted in few elections being set aside. The discussion that follows looks first at employer election victories and then at union election victories.

Racial Appeals As Grounds For Setting Aside Employer Election Victories. The Board set aside the employer's narrow election victory over the International Brotherhood of Electrical Workers (IBEW) in *Universal Manufacturing Corp.*[79] because inflammatory propaganda,

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75. *Id.* at 74, 50 L.R.R.M. at 1536.

76. *Id.* Two days before the election, the employer sent another letter to employees enclosing a newspaper article which described the national union's takeover of a nearby local union which had voted financial support for a private white school when the public schools had been desegregated under court order. *Id.* at 74-75, 50 L.R.R.M. at 1536.

77. *Id.* at 75, 50 L.R.R.M. at 1536-37.

78. *See* text accompanying notes 56-57 *supra.*

79. 156 N.L.R.B. 1459, 61 L.R.R.M. 1258 (1966).

generated "by members of the community,"[80] inhibited employees from exercising a free choice in the election. Local newspapers closely followed the heated campaign at the employer's plant in rural Mississippi. They printed articles warning of plant closings as a result of unionization and "linking unions, civil rights, and communism as if they were aspects of a single pernicious entity."[81] An editorial pointed out that Jimmy Hoffa, president of the Teamsters Union, had contributed twenty- five thousand dollars to Martin Luther King, Jr.'s efforts in connection with the Selma, Alabama "Freedom March." The article asked rhetorically, "Do I want part of my earnings to help support the forces of Martin Luther King?"[82] The newspapers printed a front-page cartoon identified as an IBEW publication showing blacks and whites marching together under a "We Shall Overcome" banner. The newspapers added the caption "where did the above slogan originate? . . . Just a Reminder!"[83] The cartoon was reprinted in a handbill distributed by anti-union employees and others. The handbill added:

> Have you asked the Union why all the unions are pushing the Civil Rights Movement? Is it because all unions are infiltrated with Communists? Here are just a few examples: We all remember the $25,000 to *Martin Luther King;* we remember that George Meany, who is National President of the AFL-CIO, said that the voter registration bill was not strong enough. . . .[A union organizer] said that she didn't give a *damn* if her kids went to school with the Negroes, and she didn't give a *damn* if she sat right beside them to work, and that the Negroes were better than what she was working with NOW.[84]

The Board held that, although the reference in the handbill to the twenty-five thousand dollar donation to Martin Luther King, Jr. by Teamsters' president Hoffa met the *Sewell* and *Allen-Morrison* standard for truthfulness, the reference was irrelevant to any aspect of the IBEW's campaign. The Board held that the remarks in the handbill attributed to a union organizer had the purpose of encouraging employees to reject the union for racial reasons. Similarly, the Board held that the method of distribution of the IBEW cartoon did not have the purpose of educating the employees about an issue germane to the campaign, but had the purpose of causing them to vote against the union on racial grounds alone.[85]

However, appeals to the racial biases of employees will not always con-

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80. *Id.* at 1467, 61 L.R.R.M. at 1260.
81. *Id.* at 1466, 61 L.R.R.M. at 1260.
82. *Id.* at 1462, 61 L.R.R.M. at 1258.
83. *Id.* at 1464, 61 L.R.R.M. at 1259.
84. *Id.* at 1465, 61 L.R.R.M. at 1259. (emphasis in original).
85. *Id.* at 1465-66, 61 L.R.R.M. at 1259-60.

stitute grounds for setting aside an election. The Board in *Coca-Cola Bottling Co. Consolidated*[86] dismissed the union's objections to an election during which a supervisor told several employees, including at least one black, that if the union won the shop steward would probably be a white employee who did not like blacks.[87] The Board held that the supervisor's conduct was not the type of deliberate, sustained appeal to racial prejudice condemned by *Sewell* and *Allen-Morrison*.[88] The Board further held that the supervisor's statement was a personal opinion amounting at most to an accusation in the nature of tolerable campaign propaganda which had been temperately presented.[89]

In *TRW - United Greenfield Division*,[90] a 1979 decision, a newspaper article posted on the employer's bulletin board reported that the union, attempting to organize the plant in Georgia, had made a six hundred and fifty thousand dollar contribution to the Martin Luther King, Jr. Center for Social Change. One supervisor told an employee that the union was "controlled by 75 percent black people."[91] Another supervisor told an employee that "whites down here ain't going to accept the fact that the Union donated any money to help Martin Luther King, Jr., they ain't ready for this kind of stuff down here."[92] The Administrative Law Judge (ALJ), whose conclusions were accepted by the Board, found that the employer had not made objectionable appeals to racial prejudice. The ALJ concluded that the newspaper article had truthfully reported the union's position on racial matters, a campaign subject which employees are entitled to be informed about under *Sewell*. In addition to finding that the employer had not deliberately sought to overstress and exacerbate racial feelings by irrelevant inflammatory appeals during the long campaign, the Administrative Law Judge concluded that the supervisors' statements were not so egregious as to be objectionable and that the particular statement concerning the effect of the union's contribution on whites was an unobjectionable expression of a supervisor's personal opinion.[93]

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86. 232 N.L.R.B. 717, 96 L.R.R.M. 1289 (1977).

87. *Id.*, 96 L.R.R.M. at 1290. There was evidence that the white employee and a black supervisor denied the rumor that the white employee was prejudiced against blacks.

88. *Id.*

89. *Id.* at 718, 96 L.R.R.M. at 1291. *See also* Mohawk Bedding Co., 204 N.L.R.B. 277, 280, 83 L.R.R.M. 1317 (1973) (foreman's reference to the union as not a white man's union but "Puerto Ricans from New York City out for the employees' money" was too isolated to have had a substantial effect on the outcome of the election in the absence of evidence that the employer made appeals to racial prejudice as a theme of his campaign).

90. 245 N.L.R.B. No. 147, 102 L.R.R.M. 1520 (1979).

91. 245 N.L.R.B. No. 147, 102 L.R.R.M. at 1522.

92. *Id.* The union generally publicized the fact that it had made the contribution.

93. *Id.*

Racial Appeals As Grounds For Setting Aside Union Election Victories. As the civil rights movement gained momentum in the 1960's and 1970's, unions, in their attempt to organize units of predominantly black employees, began linking their campaigns with the themes of the movement — black racial pride, the history of discrimination against blacks, and the importance of united action to obtain economic improvement for blacks. The Board and the courts have approved such campaign tactics, occasionally claiming that their decisions do not reflect a double standard but do reflect a line between permissible appeals to the racial consciousness of groups who have historically been economically disadvantaged and impermissible appeals to groups who have historically enjoyed an economic advantage.[94] Only in cases in which a union linked its election campaign to represent a black unit with recent nearby incidents of racial violence did a court disagree with the Board and hold that the union's propaganda was irrelevant, inflammatory and outside the *Sewell* and *Allen-Morrison* standard.[95]

The Board first applied the *Sewell* and *Allen-Morrison* standard to union campaign propaganda having a heavily racial theme in the companion cases of *Archer Laundry Co.*[96] and *Aristocrat Linen Supply Co.*[97] These cases arose out of the coordinated efforts of the AFL-CIO Laundry & Dry Cleaning International Union and local black groups to organize a predominantly black unit of workers in the Baltimore laundry industry. One campaign leaflet headed "FREEDOM IS EVERYONE'S FIGHT" was illustrated with the following: a lunging dog, captioned "Dogs couldn't stop us;" a policeman clubbing a prostrate person, captioned "Police brutality couldn't stop us;" a fire hydrant and hose, captioned "Fire hoses couldn't stop us;" and a fat, baldheaded man carrying a bag of money in one hand and a barbed club labeled "boss" in the other, captioned "Are you going to let your [boss] stop you?"[98] A second leaflet carried a photograph of pickets with signs protesting segregation, captioned "Sit In Students Call For Economic Security And Freedom," "Demand Job Rights And Progressive AFL-CIO Union Representation," and "Support the Efforts of AFL-CIO, Say Civil Rights Groups."[99] A third leaflet headed "What does Martin Luther King, Jr. have to say about

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94. *See, e.g.*, NLRB v. Sumter Plywood Corp., 535 F.2d 917, 929 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); Baltimore Luggage Co., 162 N.L.R.B. 1230, 1233-34, 64 L.R.R.M. 1145, 1146 (1967), *enforced*, 387 F.2d 744 (4th Cir. 1967).

95. NLRB v. Schapiro & Whitehouse, Inc., 356 F.2d 675 (4th Cir. 1966), *denying enforcement of* 148 N.L.R.B. 958, 57 L.R.R.M. 1094 (1964). *See* text accompanying note 104 *infra*.

96. 150 N.L.R.B. 1427, 58 L.R.R.M. 1212 (1965).

97. 150 N.L.R.B. 1448, 58 L.R.R.M. 1216 (1965).

98. 150 N.L.R.B. 1427, 1435, 58 L.R.R.M. at 1212.

99. *Id.* at 1436-37, 58 L.R.R.M. at 1214.

labor unions?" ended with, "The labor hater is almost always a twin-headed creature spewing anti-negro talk from one mouth and anti-union propaganda from the other."[100] A fourth leaflet from "The Interdenominational Ministerial Alliance" stated:

> But there is a bigger reason why you should vote for the AFL-CIO on April 9. Colored people the world over are now on the march for freedom and opportunity. We have scored many victories and we have scored them because we have not been afraid. We have believed in God and His justice. We have organized ourselves into a strong and honest force. We must continue to do so in every way we can.[101]

The Board overruled the employers' objections to the racial theme of the campaign and found that the propaganda did not have the purpose of creating hatred by blacks for whites but was designed to foster racial self-consciousness and pride in the context of concerted efforts by blacks to achieve social and economic equality with whites. The Board found that the propaganda did not suggest whites should not be permitted the same rights as blacks and that a vote against the union was not equated with a vote against another race, as in *Sewell*.[102] The Board held that the racial issues injected into the campaign by the propaganda were relevant to the campaign's central issue of the advantages of unionism to employees seeking economic betterment.[103]

NLRB v. Schapiro & Whitehouse, Inc.,[104] has been the only case to hold that a union overstepped the limits of *Sewell*. In that case, the union distributed a leaflet to the employees, who were predominantly black, which stated:

> If you are going to let this [the discharge of several employees] scare you into giving up, then you've lost and the company has won. Remember this, the people at Cambridge [a nearby town where incidents of racial violence had recently occurred] didn't get scared nor did they give up because their friends were arrested. Instead, the demonstrations grew bigger. This is the position that you must take. Show this company that you're not going to back up. Over the years you have been held down. — Let us help you to get up.[105]

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100. *Id.* at 1438, 58 L.R.R.M. at 1215.

101. *Id.* at 1430, 58 L.R.R.M. 1212.

102. 150 N.L.R.B. at 1432-34, 58 L.R.R.M. at 1214. *See also* 150 N.L.R.B. 1452-53, 58 L.R.R.M. at 1217-18.

103. *Id.*

104. 356 F.2d 675 (4th Cir. 1966), *denying enforcement of* 148 N.L.R.B. 958, 57 L.R.R.M. 1094 (1964). The case reached the Fourth Circuit upon the employer's refusal to comply with a Board order to bargain following the union's one vote election victory. The court refused to enforce the Board's order.

105. 356 F.2d at 678-79.

The court held that the leaflets referring to the "Cambridge" incidents, coupled with other propaganda linking a vote for the union with black efforts to overcome unfair employment practices, were irrelevant and highly inflammatory under *Sewell* and "altogether out of place."[106]

Almost two years later, in *NLRB v. Baltimore Luggage Co.*,[107] the Fourth Circuit, over a strong dissent,[108] upheld the Board's application of *Sewell* to a union's racially-oriented campaign in a ninty-three percent black unit. The court agreed that the union's propaganda had been "germane, temperate and factual."[109] The union's campaign, linked to the civil rights movement and supported by the NAACP, was similar to that in *Archer Laundry Co.*[110] and *Aristocrat Linen Supply Co.*[111] The union distributed a letter written by the president of the local branch of the NAACP. The letter mentioned the NAACP's support for the union, urged use of the technique of united action common to both the civil rights and labor movements, and asserted that freedom, civil rights, economic opportunity and unionism were bound together. A minister, who was also an NAACP leader, gave a speech stressing the impact that united action could have on the employees' standard of living and recounting instances of racial indignities. Another NAACP representative gave a pro-union speech in which he continually invoked the civil rights movement. He discussed the slayings of Medgar Evers and Viola Liuzzo, two civil rights activists with ties to the labor movement.

The court of appeals found that this propaganda did not have the purpose and effect of exacerbating racial prejudices.

> This was no gospel of hate. Rather than appealing to deep seated emotional fears, the letter and speeches temperately addressed themselves to the economic and social self-interest of the workers over ninety percent of whom were Negro. Such an exhortation must be a legitimate tactic in any pre-election campaign.[112]

The court held that the racial appeals were germane to the union campaign because black employees were entitled to know that the NAACP supported the union and that unionization and union tactics could secure advantages for blacks.[113]

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106. *Id.* at 679.
107. 387 F.2d 744 (4th Cir. 1967).
108. *Id.* at 749 (Boreman, J., dissenting).
109. *Id.*
110. 150 N.L.R.B. 1427, 58 L.R.R.M. 1212. *See* text accompanying note 96 *supra.*
111. 150 N.L.R.B. 1448, 58 L.R.R.M. 1216. *See* text accompanying note 97 *supra.*
112. 387 F.2d at 747.
113. *Id.* at 747-48. The dissenting judge viewed references to the violent deaths of civil rights workers as irrelevant to campaign issues involving the employer and calculated to be highly inflammatory. *Id.* at 750-51.

In *Hobco Manufacturing Co.*,[114] the Board approved similar campaign tactics involving a union's use of civil rights activists to help organize an all black voting unit. A speech by a black leader who told employees that "whites would lie to them, smile at them, and pat them on their backs, and that they should stick together and not let whites make fools of them"[115] was held not objectionable. The speech encouraged racial pride and "racial economic betterment through concerted activity."[116]

In *NLRB v. Bancroft Manufacturing Co.*,[117] the Fifth Circuit agreed with the Board that a union organizer's statement to black employees that "if the blacks did not stay together as a group and the Union lost the election, all the blacks would be fired,"[118] was not objectionable under *Sewell*. The Board held that in the context of layoffs shortly before the campaign, in which many blacks had been laid off, the statement was germane to the issue of the advantage of the union as a means of promoting economic and job security.[119] The Fifth Circuit, terming it a "close case,"[120] noted that only forty-three percent of the work force was black at the time of the election and that "any attempt by the Union to set black against white would have been suicidal."[121] The court held that although the union had failed to demonstrate the truth of its racially-oriented statements as required by *Sewell*, substantial evidence supported the Board's finding that the statements "did not so taint the campaign with racial passion as to make a fair election impossible."[122]

Finally, *NLRB v. Sumter Plywood Corp.*,[123] the Fifth Circuit again agreed with the Board, holding that the union's campaign, which centered on blacks to the relative exclusion of whites in the eighty-five percent black voting unit, did not require setting aside the results of the election. To the court, the "racial one-sidedness" of the campaign "should be given

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114. 164 N.L.R.B. 862, 65 L.R.R.M. 1173 (1967).

115. *Id.* at 866, 65 L.R.R.M. at 1174.

116. *Id.* at 862-63, 65 L.R.R.M. at 1174. *Compare* Standard Products Co., 159 N.L.R.B. 159, 165, 62 L.R.R.M. 1421, 1422 (1966), overruling union's objection that an employer's speech at a plant in Kentucky, referring to a "Yankees go home" picket sign and contrasting the Southern heritage of the employees with the Northern origins of the union organizers, was an objectionable appeal to regional prejudice under *Sewell*. The speech permissibly intended to create a feeling of regional solidarity against outsiders who could not know local conditions as well as the employees.

117. 516 F.2d 436 (5th Cir. 1975), *cert. denied*, 424 U.S. 914 (1976), *enforcing* 210 N.L.R.B. 1007, 86 L.R.R.M. 1376 (1974).

118. 516 F.2d at 440.

119. 210 N.L.R.B. at 1008, 86 L.R.R.M. at 1378.

120. 516 F.2d at 439.

121. *Id.* at 442.

122. *Id.*

123. 535 F.2d 917 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977).

the analytical effect . . . of intensifying the scrutiny" given the facts.[124] Even under this "intensified scrutiny," racial considerations were not at the core of the campaign and, therefore, the campaign was not inflammatory.[125]

III. CONCLUSION

An employer may not threaten employees that he will change working conditions by employing minorities in the event of a union victory and may not promise employees that he will protect them against job competition or changed working conditions as a result of employing minorities in the event of a union victory. However, so long as an employer does not threaten or promise, he may make truthful statements about the union's position on racial issues under the *Sewell* and *Allen-Morrison* standard, which remains the standard applied by the Board and the courts to the injection of racial issues by employers and unions into election campaigns. The *Sewell* and *Allen-Morrison* standard allows the parties a good deal of latitude in their campaigns. In practice, the standard prohibits only those intense, sustained campaigns which reduce the election to a vote on irrelevant and inflammatory racial issues alone. The parties may comment truthfully on the position of the other on racial matters. A union may link its campaign to organize black voters with the arguments and emotions of the civil rights movement, but an employer must be cautious if its campaign depends on arguments intended to persuade white

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124. 535 F.2d at 926.

125. *Id.* at 929. In other cases decided under the *Sewell* and *Allen-Morrison* standard, objections have been rejected when rumors or accusations that the employer discriminated against minority groups were rebutted by the employer. *See* NLRB v. Staub Cleaners, Inc., 418 F.2d 1086 (2d Cir. 1969), *cert. denied*, 397 U.S. 1038 (1970). *See also* NLRB v. Heavy Lift Serv., Inc., 607 F.2d 1121 (5th Cir. 1979), *cert. denied*, 49 U.S.L.W. 3232 (1980). In *Staub*, such rumors were disavowed by the union. In Dumas Bros. Mfg. Co., 205 N.L.R.B. 919, 84 L.R.R.M. 1411 (1973), *enforced without opinion*, 495 F.2d 1371 (5th Cir. 1974), the Board found that similar rumors were not attributable to the union. *See* 607 F.2d 1121. *See also* Singer Co., 191 N.L.R.B. 179, 77 L.R.R.M. 1378 (1971). Objections were also rejected in a case in which a union organizer told black employees that the union would eliminate discrimination, Tyler Pipe Ind., Inc., 180 N.L.R.B. 880, 76 L.R.R.M. 1830 (1970), *enforcement denied*, 447 F.2d 1136 (5th Cir. 1971). Although employees at a union meeting mocked the "thick, heavy Jewish accent" of one of the employer's owners in Maple Shade Nursing Home, Inc., 223 N.L.R.B. 1475, 1483-84, 92 L.R.R.M. 1178, 1179 (1976), union objections were made in vain. Union misrepresentations that the employer discriminates against minorities, even if not objectionable by themselves under *Sewell*, may nevertheless contribute to the objectionable nature of a pattern of deliberate union misrepresentations on other campaign issues. *See* Peerless of America, Inc. v. NLRB, 576 F.2d 119, 126 (7th Cir. 1978), *denying enforcement of* 229 N.L.R.B. 183, 96 L.R.R.M. 1048 (1977).

voters that they will continue to have economic advantage over minorities only by rejecting a union.