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John W. Teeter Jr

St. Mary's University School of Law, jteeter@stmarytx.edu

Christopher Burnett

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REPRESENTATION ELECTIONS, ANTI-SEMITISM AND THE
NATIONAL LABOR RELATIONS BOARD

John W. Teeter, Jr.* and Christopher Burnett**

It seems to be almost a law of human nature that it is easier for people to agree on a negative program—on the hatred of an enemy, on the envy of those better off—than on any positive task. The contrast between the “we” and the “they,” the common fight against those outside the group, seems to be an essential ingredient in any creed which will solidly knit together a group for common action.¹

— F.A. Hayek

Anti-Semitism² exists in our nation’s labor relations, both in the factory³ and in the corporate setting.⁴ Although it may be difficult to

* Professor, St. Mary’s University School of Law. A.B. 1982, University of Illinois at Chicago Circle; J.D. 1985, Harvard Law School.

** B.A. 1982, University of Colorado; M.A. 1988, J.D. 1997, St. Mary’s University, .

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¹ F.A. Hayek, *The Road to Serfdom* 153 (anniversary ed. 1994).

² An “anti-Semite” may be defined simply as a person who is hostile toward or prejudiced against Jews. *American Heritage College Dictionary* 60 (3d ed. 1993). The term “anti-Semitism” in fact was coined by Wilhelm Marr, who wanted a new term to replace the German word *Judenhass* (Jew-hatred) so that anti-Jewish bigots would appear less vulgar and more scientific. Joseph Telushkin, *Jewish Literacy* 467 (1991). Rabbi Telushkin advocates using “antisemite” instead of “anti-Semite” to underscore that anti-Semitism is not directed at all Semitic peoples, but at Jews alone. Id. Alan M. Dershowitz suggests that “Judeopath” is preferable to “anti-Semite” because the former connotes “the sickness and evil inherent in such bigotry.” Alan M. Dershowitz, *Chutzpah* 121 (1991). We will use the various terms interchangeably.

A related issue is whether anti-Semitism should be conceptualized as ethnic, racial, or religious bigotry. According to Rabbis Kertzer and Hoffman, Jews properly are characterized as a religious or cultural group rather than as a race. Morris N. Kertzer & Lawrence A. Hoffman, *What is a Jew?* 7-8 (1993). As they explain, Jews once were considered an ethnic group, but “[t]he ethnic definition is going the way of the dinosaur.” Id. at 8. Neither the courts nor the National Labor

quantify,⁵ such bigotry undermines employee freedom and workplace democracy in several significant ways. This Article focuses on one vital aspect of work-related anti-Semitism, the use of anti-Jewish tactics in labor representation elections. Both unions and employers have resorted to anti-Semitic campaign ploys to garner the votes of workers. This Judeopathic practice has proved to be a vexing problem for both the National Labor Relations Board ("the Board") and the federal courts.

Unfortunately, the Board has been inexcusably permissive in its response to anti-Semitic propaganda, repeatedly minimizing its possible effects on electoral results. This is not to say that the Board and its agents knowingly have condoned anti-Semitism. It is undeniable, however, that

Relations Board have characterized anti-Semitism consistently as being either religious or racial hostility, and this distinction has apparently not been determinative in their decisions.

³ Some observers assert that anti-Semitism appears particularly entrenched among blue-collar workers. See, e.g., David Singer & Renae Cohen, *Probing Public Sentiment on Israel and American Jews* 15 (1987) (finding that ten percent of blue-collar workers but only four percent of their white-collar counterparts believe that Jews have too much power in the United States); Stewart J. D'Alessio & Lisa Stolzenberg, *Anti-Semitism in America: The Dynamics of Prejudice*, 61 *Soc. Inquiry* 359, 360 (1991) (stating that blue-collar workers "are reported to be virulent toward members of the Jewish faith"). Further, two scholars have concluded that "the tendency of blue-collar workers to be anti-Semitic is largely a function of their lesser education." Gertrude J. Selznick & Stephen Steinberg, *The Tenacity of Prejudice: Anti-Semitism in Contemporary America* 76 (1969).

⁴ Corporate anti-Semitism also has deep roots and continuing consequences. See, e.g., Robert P. Quinn et al., *The Chosen Few: A Study of Discrimination in Executive Selection* 30 (3d ed. 1973) ("Anti-Semitic attitudes appear to constitute a substantial stumbling block for companies attempting to implement policies of equal opportunity."); Jean-Paul Sartre, *Anti-Semite and Jew* 35-37 (George J. Becker trans., Schocken Books Inc. 1995) (1948) (arguing that anti-Semitism is more common among the middle class than among workers); Stephen L. Slavin & Mary A. Pradt, *The Einstein Syndrome: Corporate Anti-Semitism in America Today* 2 (1982) (contending that Jews are "systematically excluded from . . . the corporate mainstream"); Abraham K. Korman, *Anti-Semitism in Organizations and the Behavioral Sciences: Towards a Theory of Discrimination in Work Settings*, 9 *Contemp. Jewry* 63, 69-70 (1988) (finding "considerable evidence to indicate that Jews are less likely to be selected for the higher-levels of American corporations than would be indicated by their general level of education and their frequency in the population from which managers and executives are normally drawn"); Samuel Z. Klausner, *Anti-Semitism in the Executive Suite*, *Moment*, Sept. 1988, at 33, 55 (cautioning that "the current decline in executive discrimination against Jews does not guarantee that this situation will persist").

⁵ Scholars have emphasized the inherent difficulties in measuring anti-Jewish attitudes. See, e.g., Simon Epstein, *Cyclical Patterns in Antisemitism: The Dynamics of Anti-Jewish Violence in Western Countries Since the 1950's* 17 (1993) (cautioning that "any effort to quantify antisemitism comes up against considerable psychological resistance"); Tom W. Smith, *Actual Trends or Measurement Artifacts? A Review of Three Studies of Anti-Semitism*, 57 *Pub. Op. Q.* 380, 380-81 (1993) (noting that "numerous methodological differences across the studies seriously undermine their comparability and compromise the examination of changes in anti-Semitism"); Lucy S. Dawidowicz, *Can Anti-Semitism Be Measured?*, *Commentary*, July 1970, at 36 (asserting that surveys are inherently "unequipped to investigate the historic images and themes of anti-Semitism which still flourish in the American variety").

the Board has been inconsistent in applying its own remedial standard to this problem. This inconsistency—to give the Board the benefit of the doubt—stems from a combination of ignorance, confusion, and a reflexive adherence to bad precedent.

The issue, then, is how the Board should address anti-Semitism in labor representation elections. In particular, we address the question of when anti-Semitic behavior or propaganda by unions, employers, employees, or others should constitute grounds for invalidating an election and ordering a new vote. This requires examining whether the Board and the courts consistently have applied the doctrine of *Sewell Manufacturing Co.*⁶ to representation elections involving anti-Semitic behavior. We conclude that the Board has been haphazard and lax in applying *Sewell* in cases involving anti-Semitism, whereas the federal appellate courts have applied *Sewell* more consistently to purge elections of anti-Jewish misconduct.

The federal courts have been more vigilant than the Board, and frequently have refused to enforce Board orders that trivialize anti-Semitism.⁷ This divergence between the Board and reviewing courts may be the result of a pattern of nonacquiescence on the part of the Board. A federal circuit court has the power to review appeals from the Board's decisions and to enforce, modify, or set aside such orders.⁸ That does not mean, however, that the Board must adhere to a circuit court's ruling in its own subsequent decisions. As the Board has declared:

It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise.⁹

Such independence raises obvious problems. As the Board diverges from the circuit courts and the circuit courts fragment among themselves, the

⁶ 138 N.L.R.B. 66 (1962) (holding that inflammatory appeals to racial prejudice are prohibited in the conduct of labor representation elections).

⁷ See general discussion in Part II, Sections B & C.

⁸ 29 U.S.C. § 160(f) (1994) (empowering a United States court of appeals "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board").

⁹ Insurance Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), enforcement denied, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960). Of course, a circuit court is not compelled to accept the Board's nonacquiescence in subsequent cases.

law becomes increasingly unclear and the amount of appellate litigation (with all its expenses and delays) multiplies.¹⁰ This indeterminacy is worsened by the forum shopping that results as parties direct appeals to circuits that seem to favor their positions.¹¹ Judicial review is thus a spotty palliative for anti-Jewish campaign ploys in labor representation elections. Any lasting, systemic cure must come from the Board itself.

Labor disputes, unfortunately, are laden with instances of anti-Semitic behavior, especially in cases involving firings,¹² contentious strikes,¹³ and union organizing efforts.¹⁴ Fortunately, the number of cases involving appeals to anti-Semitic prejudice during representation election campaigns is relatively modest. In a very real sense, however, these cases are even

¹⁰ See, e.g., Richard Posner, *Economic Analysis of Law* 511 (3d ed. 1986) (explaining that if there is doctrinal confusion, then "there will be much litigation, including much appellate litigation").

¹¹ As two scholars have noted, "When an NLRB order renders both the union (or employee) and the employer 'aggrieved,' it is possible for petitions to be filed in three different circuits—setting in motion a 'race to the courthouse' that is only partially mitigated by recent legislation." Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *Yale L.J.* 679, 706 (1989) (footnote omitted). Estreicher and Revesz, however, recognize "the legitimacy of an agency's desire to maintain a uniform administration of its governing statute while it reasonably seeks the national validation of its preferred position." *Id.* at 771. See also Scott Kafkaer, *Nonacquiescence by the NLRB: Combat Versus Collaboration*, 3 *Lab. Law.* 137, 162 (1987) (discussing the nonacquiescence debate in the context of "the state of war that sometimes seems to exist between the Board and the courts of appeals").

¹² See, e.g., *Animal Humane Soc'y of S. Jersey, Inc.*, 287 N.L.R.B. 50 (1987) (upholding discharge of employee who used an anti-Semitic slur against his employer); *National Council of Young Israel*, 276 N.L.R.B. 1123 (1985) (ordering that discharged employee who had been accused of making a profane anti-Semitic insult be placed on preferential hiring list); *Pine Valley Meats, Inc.*, 255 N.L.R.B. 402 (1981) (reinstating employee notwithstanding anti-Jewish remark made by him); *Seaport Manor, Inc.*, 248 N.L.R.B. 886 (1980) (ordering reinstatement of employee who allegedly made Judeopathic comment); *Flavorpipe Co.*, 222 N.L.R.B. 1144 (1976) (reinstating employee who had been accused of painting anti-Semitic graffiti).

¹³ See, e.g., *Domsey Trading Corp.*, 310 N.L.R.B. 777 (1993) (reinstating striking employees who chanted anti-Semitic slogans during a particularly contentious strike), enforced, 16 F.3d 517 (2d Cir. 1994); *Aztec Bus Lines, Inc.*, 289 N.L.R.B. 1021 (1988) (refusing to order reinstatement of profane and violent strikers who employed anti-Semitic slurs along with other offensive comments); *Nassau Ins. Co.*, 280 N.L.R.B. 878 (1986) (discussing a non-striking employee who was subjected to anti-Jewish insults by a striker on the picket lines).

¹⁴ See, e.g., *Fresh Mark, Inc.*, 322 N.L.R.B. 127 (1996) (stating in regard to alleged actions of a union organizer that absent other actions, making a Nazi salute and goose-step can be construed as a political statement as opposed to anti-Semitic acts); *Batavia Nursing and Convalescent Inn*, 275 N.L.R.B. 886 (1985) (discussing assault of union organizer by Jewish management attorney for allegedly making anti-Semitic slur); *Clark Manor Nursing Home Corp.*, 254 N.L.R.B. 455 (1981) (discussing disgruntled former union supporter referring to union organizers in an anti-Semitic manner), enforced as modified, 671 F.2d 657 (1st Cir. 1982); *Glass Guard Indus.*, 218 N.L.R.B. 176 (1975) (noting union business agent's alleged comment that "Hitler had not killed enough Jews").

more pernicious than those involving individual firings or strikes. Anti-Semitic appeals during representation campaigns are particularly insidious because attempts, either planned or spontaneous, to influence election outcomes through appeals to irrational prejudice affect the exercise of the democratic franchise. As analyzed below, however, it is clear that Board members have much to learn from their judicial brethren when it comes to deterring the use of anti-Semitic tactics in representation campaigns.

I. FREEDOM TO CHOOSE

The National Labor Relations Act¹⁵ (the “Act”) empowers workers to choose through representation elections whether a union shall represent them for purposes of collective bargaining. Employers and unions typically wage robust campaigns for the workers’ allegiance and the process commonly concludes with a secret ballot election administered by the Board.¹⁶ These campaigns are regulated closely by the Board to ensure that workers are able to make a free and informed choice. The Board will vacate an election and order new balloting when it concludes that the workers’ freedom of choice may have been compromised.¹⁷ Examples of such interference could include an employer’s resort to unlawful discharges¹⁸ or bribes,¹⁹ a union’s reliance on intimidation tactics,²⁰ or

¹⁵ 29 U.S.C. §§ 151-169 (1994).

¹⁶ *Id.* § 159(c)(1)(B) (“If the Board finds . . . a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.”).

¹⁷ For excellent discussions of the Board’s role, see Robert E. Williams, *NLRB Regulation of Election Conduct* (rev. ed. 1985); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 *Minn. L. Rev.* 495 (1993); Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 *Harv. L. Rev.* 38 (1964).

¹⁸ See, e.g., *Morehead City Garment Co.*, 94 N.L.R.B. 245 (1951) (finding that employer had discharged employees in order to discourage union activity), enforced as modified, 191 F.2d 1021 (4th Cir. 1951) (*per curiam*).

¹⁹ See, e.g., *The Borden Mfg. Co.*, 193 N.L.R.B. 1028 (1971) (affirming finding of hearing officer that employer had promised to be more generous in granting benefits to employees if the union lost the election); *Paterson Fire Brick Co.*, 93 N.L.R.B. 1118 (1951) (affirming finding of hearing officer that employer had promised to rehire a laid-off employee if the union lost the election); *Wytheville Knitting Mills, Inc.*, 78 N.L.R.B. 640 (1948) (finding that company president had offered substantial insurance benefits to workers in the event that the union lost the election).

²⁰ See, e.g., *Knapp-Sherrill Co.*, 171 N.L.R.B. 1547 (1968) (upholding finding of hearing officer that workers had been threatened with possible job loss or other employment difficulties if they did not support the union); *G.H. Hess, Inc.*, 82 N.L.R.B. 463 (1949) (affirming finding of hearing officer that union had threatened anti-union worker with economic reprisal and possible bodily harm if she voted in the election).

even actions by the Board's own agents that could suggest a lack of impartiality regarding the outcome of the election.²¹

When either the employer or the union loses an election, it may file objections with the Board's regional director alleging that the voting process was contaminated. The regional director has broad discretion to decide whether such objections warrant investigation and may order a hearing to resolve the matter. If any objections are sustained, the results of the balloting are voided and the Board typically schedules a new election. If, in contrast, the objections are found meritless, the Board will certify the election results.²²

The employer is not permitted to seek direct judicial review of an election's legitimacy when the Board certifies the union as the workers' collective bargaining representative over the employer's objections.²³ Instead, the employer commonly refuses to bargain with the union, prompting the union to file charges under section 8(a)(5) of the Act.²⁴ The Board usually invokes a summary judgment procedure and issues an order finding the employer guilty of an unfair labor practice and directing it to bargain with the union. The employer then may seek judicial review under section 10(f)²⁵ or wait for the Board to pursue judicial enforcement under section 10(e).²⁶ In this convoluted manner, the employer obtains judicial review of its underlying objections to the election.

In its landmark *General Shoe Corp.*²⁷ decision, the Board emphasized its responsibility for ensuring the sanctity of elections. As part of a

²¹ See, e.g., *Hudson Aviation Serv.*, 288 N.L.R.B. 870 (1988) (invalidating election on grounds that Board agent had quarreled with employer's assistant manager in front of workers); *Athbro Precision Eng'g Corp.*, 166 N.L.R.B. 966 (1967) (vacating election where Board agent drank beer with union representative during a break in the polling), vacated sub nom. *International Union of Elec., Radio & Mach. Workers v. NLRB*, 67 L.R.R.M. (BNA) 2361 (D.D.C. 1968), acq. in result, 171 N.L.R.B. 21 (1968), enforced, 423 F.2d 573 (1st Cir. 1970).

²² See generally 29 C.F.R. §§ 102.60-102.82 (1997) (detailing procedures for issues concerning representation of employees); Williams, *supra* note 17, at 15-20.

²³ The Supreme Court unanimously held in *American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940), that direct judicial review of the Board's certification decisions is not permitted due to limitations in the relevant statute and legislative intent. *Id.* at 409-11. The only exception is when there are extraordinary circumstances requiring immediate judicial attention. See, e.g., *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (permitting suit "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act").

²⁴ 29 U.S.C. § 158(a)(5) (providing that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees").

²⁵ 29 U.S.C. § 160(f) (authorizing parties to seek judicial review of the Board's orders).

²⁶ 29 U.S.C. § 160(e) (authorizing the Board to pursue judicial enforcement of its orders).

²⁷ 77 N.L.R.B. 124 (1948).

“captive audience speech,”²⁸ the employer had referred to the union organizer in terms suggesting an appeal to anti-Semitic sentiment. “Incidentally,” the employer stated, “this man Burke of St. Louis, is not really named Burke, but Berg, a Jewish man from Brooklyn, New York. The Union formed here in Pulaski would be under his jurisdiction.”²⁹ The trial examiner interpreted this as an appeal to anti-Semitism³⁰ and concluded that, in conjunction with other coercive comments by the employer,³¹ it constituted sufficient grounds for overturning the employer’s electoral victory and ordering a new election.³² The Board agreed, emphasizing the need to preserve the integrity of elections:

In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.³³

General Shoe was promising: the Board plainly acknowledged its duty to protect “laboratory conditions” and effectively condemned the use of anti-Semitic innuendo. Furthermore, in its celebrated 1962 *Sewell Manufacturing Co.*³⁴ decision, the Board established the standard by which racial, ethnic, and religious propaganda in representation elections are to be judged. In *Sewell*, an employer in the deep South distributed

²⁸ In a captive audience speech, the employer requires workers to gather during working time and listen to anti-union arguments. See, e.g., Williams, *supra* note 17, at 269-88 (discussing development of Board doctrine on employer speeches at the workplace). The Board upheld the lawfulness of such speeches in *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948), but they commonly have been criticized as inherently coercive. See, e.g., Becker, *supra* note 17, at 559 (asserting that “such conduct involves an element of coercion easily distinguishable from expression”).

²⁹ *General Shoe*, 77 N.L.R.B. at 138.

³⁰ *Id.* at 139.

³¹ These other comments included a warning by a foreman to a union member that he would regret the decision to vote for a union and a foreman’s appeal to racial prejudice while criticizing the union. *Id.*

³² *Id.*

³³ *Id.* at 127 (footnote omitted).

³⁴ 138 N.L.R.B. 66 (1962).

racially inflammatory materials to its work force during the election campaign.³⁵ The Board vacated the election results and promulgated what is known today as the *Sewell* doctrine, whereby the injection of racial issues into a campaign is viewed with deep suspicion as a potentially inflammatory appeal to the voters' basest, most irrational instincts. As the Board reasoned:

[A]ppeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.³⁶

For these reasons, the use of racial propaganda constitutes grounds for vacating the speaker's electoral victory unless the statement is truthful, germane, and temperate in tone.³⁷ Furthermore, the party making the racial statement has the burden of proving that these conditions are met.³⁸

The promise of *General Shoe* and *Sewell*, however, proved to be short-lived. In subsequent years the Board has been weak, vacillating, and disturbingly indifferent to anti-Semitic sentiments in elections. All too often, parties have been forced to resort to the appellate courts for the

³⁵ *Id.* at 67-68. These materials included a racist newspaper, pictures of interracial dancers, and repeated efforts to link the union with integration and social "race-mixing." *Id.* at 67-68, 72.

³⁶ *Id.* at 71.

³⁷ *Id.* at 71-72.

³⁸ *Id.* at 72. *Sewell* has generated significant commentary on the Board's proper role, if any, in the regulation of ethnic hate speech as a form of campaign propaganda. See, e.g., Nicholas A. Beadles & Christopher M. Lowery, Union Elections Involving Racial Propaganda: The *Sewell* and *Bancroft* Standards, 42 Lab. L.J. 418 (1991) (examining Board policy and court decisions concerning racially-based electioneering); Charlotte LeMoynes, Comment, The Unresolved Problem of Race Hate Speech in Labor Union Elections, 4 Geo. Mason U. Civ. Rts. L.J. 77 (1993) (calling for the Board to deregulate racially oriented speech in elections); Daniel H. Pollitt, The National Labor Relations Board and Race Hate Propaganda in Union Organization Drives, 17 Stan. L. Rev. 373 (1965) (promoting dialogue as the antidote to racial hate speech); Rudolf Sachs, The Racial Issue as an Antiunion Tool and the National Labor Relations Board, 14 Lab. L.J. 849 (1963) (advocating stricter Board regulation of racial speech); Alan Story, Employer Speech, Union Representation Elections, and the First Amendment, 16 Berkeley J. Emp. & Lab. L. 356 (1995) (arguing that employer campaign speech should be denied any constitutional protection); Note, Employee Choice and Some Problems of Race and Remedies in Representation Campaigns, 72 Yale L.J. 1243 (1963) (questioning the coherence and workability of the *Sewell* standard).

vindication of their claims that laboratory conditions were ruined by anti-Jewish tactics.

II. NEW SHOES: THE BOARD'S COMPLACENCY TOWARD ANTI-SEMITISM

For the past forty years, the Board has compiled a dismal record of indifference towards Judeopathic campaign ploys. This record falls into three distinct eras. First was the *Paula Shoe*³⁹ period, during which the Board cryptically adopted a laissez-faire approach to anti-Semitism. This was followed by a period of judicial reaction, during which appellate courts repeatedly reversed the Board's orders in an effort to ensure campaign decency. Finally, there is the current period of administrative intransigence, in which the Board continues to ignore judicial opinion and remains passive in the midst of anti-Jewish electioneering. Each era is discussed in turn.

A. *The Other Shoe Drops*

In *Paula Shoe Co.*, the Board inexplicably abandoned the role of vigilant watchdog it had proclaimed for itself ten years earlier in *General Shoe Corp.*⁴⁰ In *Paula Shoe*, the employer challenged the union's victory because the union had distributed a handbill containing an anti-Semitic remark. Referring to the plant manager, the union's handbill stated: "If you want to avoid that the Jew Sandler continue to mistreat you, vote for UTM."⁴¹ As the employer reasoned, this slur was "designed to incite racial and religious prejudice against its plant manager and thus impair a free choice by the employees in the election."⁴² The Board disagreed,

³⁹ 121 N.L.R.B. 673 (1958).

⁴⁰ *Paula Shoe*, 77 N.L.R.B. 124 (1948). The fickle nature of Board precedents has been recognized and accepted by reviewing courts. As the Seventh Circuit explained:

It is . . . clear that the Board's previous decisions do not bind it in later proceedings with anything like the force of the doctrine of stare decisis in the courts. The Board is free to change its mind on matters of law that are within its competence to determine, provided it gives a reasoned analysis in support of the change.

Local 1384, UAW v. NLRB, 756 F.2d 482, 492 (7th Cir. 1985). See also NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265 (1975) (reasoning that "[t]he use by an administrative agency of the evolutionary approach is particularly fitting").

⁴¹ *General Shoe*, 121 N.L.R.B. at 675-76.

⁴² *Id.* at 676.

however, and held that this slur was insufficient to spoil the election.⁴³ While claiming that it did not “condone appeals to prejudice,” the Board concluded that “the mere mention of a racial or religious issue is not grounds for setting aside an election.”⁴⁴

Such reasoning fails to pass muster. First, this was not the “mere mention” of ethnicity, but a deliberate effort to arouse anti-Jewish sentiments. Second, the Board’s emphasis that this was a solitary occurrence is worrisome: it implies there is an acceptable level of Jew-bashing that parties can undertake without facing adverse consequences. Third, the Board was myopic in arguing that this was an isolated event when the handbill was distributed to 139 eligible voters. *Paula Shoe* thus signals a Board less committed to cleansing elections of all anti-Semitic appeals.

Although *Paula Shoe* was decided prior to *Sewell Manufacturing Corp.*,⁴⁵ the Board’s anemic response to Judeopathic tactics has continued in the post-*Sewell* era. In *Maple Shade Nursing Home, Inc.*,⁴⁶ for example, the Board belittled the effects of anti-Semitic behavior during union organizational meetings. Here, the employer objected that union organizers and employees ridiculed him by imitating his heavy “Jewish” accent during several meetings.⁴⁷ Despite such ridicule, the administrative law judge (“ALJ”) opined:

I am reminded of an ancient line of Board cases that speak of union activities not being any form of tea party. The Union did nothing here to inflame irrational prejudices, and the employees laughed at their own jokes. There is no basis in this evidence for finding disrespect on the part of the employees towards their employer. I find no merit in this objection⁴⁸

Once again, such reasoning is unpersuasive. While it is beyond question that representation campaigns are robust affairs, with rough

⁴³ *Id.* Apparently adopting a “one free bite” philosophy, the Board stressed that the handbill contained the only anti-Semitic reference of the campaign. *Id.*

⁴⁴ *Id.*

⁴⁵ 138 N.L.R.B. 66 (1962).

⁴⁶ 223 N.L.R.B. 1475 (1976).

⁴⁷ *Id.* at 1483-84.

⁴⁸ *Id.* at 1484.

language and indelicate name-calling,⁴⁹ racial ridicule is clearly different in kind than the everyday use of intemperate language. Generalized profanity simply cannot be equated with repeated “jesting” assaults on a person’s ethnic identity and cultural attributes.⁵⁰ The ALJ, however, seemed to conclude that prejudice directed at Jews is acceptable as long as the perpetrators find it amusing. Furthermore, in addition to being insensitive, the ALJ also appears to have been ignorant of the standard Board doctrine that “joking” is no defense.⁵¹ Despite these problems, the Board adopted the ALJ’s decision without even mentioning the anti-Semitic incident.⁵²

B. Judicial Footsteps

The Board’s refusal to deter anti-Jewish tactics prompted a salutary judicial reaction. In the 1980s, a dialectical pattern emerged whereby the courts repeatedly rejected the Board’s certification of elections tainted by

⁴⁹ As the Supreme Court has observed, “[R]epresentation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.” *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 58 (1966) (citing *Cafeteria Union v. Angelos*, 320 U.S. 293, 295 (1943)).

⁵⁰ Numerous courts and commentators have realized the malevolent undercurrents of much ethnic and sexual “humor.” As Professor MacKinnon reports, “A computer search of federal sexual and racial harassment cases through 1992 yields 144 cases that involve alleged jokes. Usually the courts are not laughing.” Catharine A. MacKinnon, *Only Words* 128 n.14 (1993). See, e.g., *Snell v. Suffolk County*, 611 F. Supp. 521, 529 (E.D.N.Y. 1985) (differentiating “idle banter among friends and comrades” from “sharp and cutting slurs designed to demean, harass and intimidate”), *aff’d*, 782 F.2d 1094 (2d Cir. 1986). For perceptive analyses of ethnic humor, see John H. Burma, *Humor as a Technique in Race Conflict*, 11 *Am. Soc. Rev.* 710, 710 (1946) (observing that “subtle barbs often strike more telling blows than gratuitous insult or rational argument”); Christie Davies, *Ethnic jokes, moral values and social boundaries*, 33 *British J. Soc.* 383, 400 (1982) (discussing the role of such humor in reducing anxiety and providing a sense of legitimization); Nicholas J. Gadfield et al., *Dynamics of Humor in Ethnic Group Relations*, 6 *Ethnicity* 373, 373 (1979) (relating conventional wisdom that ethnic jokes “are most appreciated when they attack group members with whom one does not identify and does not like”). As Professor Burma concluded, “Any persons or groups who are the butt of [ethnic] jokes thereby suffer discriminatory treatment and are indirectly being relegated to an inferior status.” Burma, *supra* at 714-15.

⁵¹ As the Board explained in *Conagra, Inc.*, 248 N.L.R.B. 609 (1980), “It is no defense that a violation is committed in a friendly or joking manner.” *Id.* at 609. See also *Ethyl Corp.*, 231 N.L.R.B. 431, 434 (1977) (explaining that “the coercive and unlawful effect of a statement is not blunted merely because . . . [such remarks] are accompanied by laughter or made in an offhand humorous way”).

⁵² *Maple Shade*, 223 N.L.R.B. at 1475-76. After the Board’s initial decision, the employer attempted to have the issue reconsidered, but the Board refused. See *Maple Shade Nursing Home, Inc.*, 228 N.L.R.B. 1457 (1977). Instead, the Board dismissively found that the issue of anti-Semitism had been raised and decided during the prior hearing. *Id.* at 1458.

bigotry. It thus has been the circuit courts, and not the Board, that have endeavored to preserve the sanctity of elections.

In *NLRB v. Silverman's Men's Wear, Inc.*,⁵³ the Board drew judicial ire for its failure to respond to an anti-Semitic statement. In *Silverman's*, the regional director had refused to hold a hearing to investigate a union officer's alleged remark to employees that the company's vice-president was a "'stingy Jew.'"⁵⁴ The regional director assumed that the remark actually was made, but held that it did "not afford a sufficient basis for setting aside an election."⁵⁵ Relying on *Paula Shoe*, he characterized the slur as "'[a] single, casual reference to a party's religious or ethnic background in a campaign otherwise free of racial hostility.'"⁵⁶ He opined that *Sewell*, in light of *Paula Shoe*, held that "'only a deliberate and sustained appeal to racial prejudice which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory . . . appeals affords a sufficient basis for setting aside a Board election.'"⁵⁷

The Third Circuit found this argument meritless. As the court reasoned, "If the Union leader had desired to stress the executive's parsimony, he could have referred to 'stingy Silverman' or the 'stingy vice-president.' Instead, he allegedly resorted to a disreputable stratagem of bigots. The man's religion was not germane to the proper purposes of this election effort."⁵⁸ The Third Circuit took particular exception to the Board's reliance on *Paula Shoe*. As the court emphasized, that decision was hardly a model to emulate:

In *Paula Shoe Co.*, the Board, without a prior hearing, rejected an objection to an election based on the union's inclusion in a handbill of a slur similar in character to the one now before us. Frankly, we find such a conclusion, reached without benefit of a hearing to determine the circumstances and likely impact of such a statement, to be inconsistent with the Board's professed position that "it

⁵³ 656 F.2d 53 (3d Cir. 1981) (per curiam).

⁵⁴ Id. at 57.

⁵⁵ Id.

⁵⁶ Id. at 58.

⁵⁷ Id. (emphasis omitted). Even more disturbing, the Board argued in its appellate brief that the racist jab was "marginally germane" to the election. Id. at 58 n.7.

⁵⁸ Id.

does not condone appeals to prejudice,” and we reject it as an anomaly.⁵⁹

Furthermore, the Board had ignored the essence of *Sewell*'s condemnation of racial hate speech. The court interpreted *Sewell* as holding that “an effective appeal to racial or religious prejudice prima facie warrants setting aside an election.”⁶⁰ Viewed through this lens, the facts of *Silverman*'s

disclose an utterance that falls well within the proscription of that general rule. In making a remark such as the one involved here, a party does not simply set forth another party's position on matters of racial interest. Indeed, the remark, rather than identifying any position of the Employer, can typically serve only to spotlight the minority religion of the Company's principal. Such a remark has no purpose except blatantly to exploit religious prejudices of the voters.⁶¹

Finally, as the court stated, an essential reason for strict enforcement of *Sewell* is that it sends a clear signal to all current and any future parties “that the Board will back up with action, not just tongue clicking, its position that it does not condone appeals to racial prejudice.”⁶² The court, therefore, denied enforcement of the Board's bargaining order and remanded the case for a hearing on the issue of whether the alleged comment was made and the extent to which it infected the election.⁶³

Silverman's merits our modest applause. The decision is praiseworthy in that it places the necessary emphasis on the fact that *Paula Shoe* was fundamentally flawed, that it effectively has been superseded by *Sewell*, and that there should be no tolerance of the venomous targeting of ethnic or religious minorities in elections. It is disheartening, however, that such basic lessons were iterated for the first time by an appellate court rather than by the Board.

Even so, *Silverman*'s is not free from ambiguity. In the midst of its otherwise well-reasoned opinion, the court dropped a somewhat ominous

⁵⁹ Id. at 59 (citation omitted). The court also explained that “*Sewell* stripped the earlier result in *Paula Shoe* of any possible rationale.” Id.

⁶⁰ Id. at 58.

⁶¹ Id.

⁶² Id. at 59 n.9. Unfortunately, as this Article illustrates, the Board repeatedly has ignored this distinction between lip service and effective deterrence.

⁶³ Id. at 60.

note, stating: "We need not now speculate whether there could ever be a blatant ethnic slur, having no other purpose or possible effect than to invoke irrelevant prejudices, that could properly be treated by the Board as if it had never occurred."⁶⁴ This caveat raises troublesome issues. It is not clear how a "blatant ethnic slur" could ever justifiably be ignored, and there was no reason for the Third Circuit to speculate that there might exist cases of harmless ethnic antagonism. This artless dicta merely left room to maneuver for a Board with a clear history of ignoring, minimizing, or excusing the impact of Judeopathic campaign tactics. It is both curious and regrettable that the *Silverman's* court did not quit while it was ahead.

*NLRB v. Katz*⁶⁵ illustrates the Board's disturbing pattern of failing to investigate anti-Semitic incidents. In *Katz*, the anti-Semitic remarks came not from a union or employer representative, but a local Catholic priest sympathetic to the union's cause.⁶⁶ During a union meeting held at a nearby church, this priest began his speech by discussing the movie "Holocaust," a film about the Nazis' extermination of the Jews.⁶⁷ He then argued that "'Paul and Mrs. Katz are Jewish and they're getting rich while we're getting poor . . . Jewish people are rich and we are poor and killing ourselves for them.'"⁶⁸ The union, for its part, did not repudiate the priest's comments.⁶⁹ Notwithstanding the campaign's anti-Jewish tenor, the Board upheld the union's electoral victory and found the employer guilty of an unlawful refusal to bargain.⁷⁰

As in *Silverman's*, however, the Board's effort to seek refuge in *Paula Shoe* was rebuffed by the Seventh Circuit:

The *Silverman's* case is analogous to the case at bar. There is no conceivable way in which either the movie "Holocaust" or the Nazis' treatment of Jewish people during World War II could be relevant to a legitimate campaign issue. To the extent that the priest's comment regarding the wealth of Jewish people, as juxtaposed to the poverty of the employees, might be relevant to the

⁶⁴ Id. at 58 n.8.

⁶⁵ 701 F.2d 703 (7th Cir. 1983), denying enforcement to 251 N.L.R.B. 1633 (1980).

⁶⁶ Id. at 705.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id. at 707.

⁷⁰ 251 N.L.R.B. 1633, 1635.

campaign, the point could have been made without resort to a religious slur.⁷¹

The court concluded that even if *Paula Shoe* survived *Sewell*, it would still seem to be “inconsistent with the Board’s professed position that ‘it does not condone appeals to prejudice.’”⁷²

Of even greater significance, the court reasoned that the election had to be vacated despite the fact that the prejudicial remarks came from a third party rather than the company or the union. The court explained that “[t]he relevant legal inquiry is whether the inflammatory remarks could have impaired the employees’ freedom of choice in the subsequent election.”⁷³ Given that most of the workers were Catholic, the priest was a vocal union advocate, and the union never repudiated his bigoted remarks, there was a strong likelihood that anti-Semitism impermissibly tainted the election’s outcome. The *Katz* court, therefore, overturned the election and refused to enforce the Board’s bargaining order.⁷⁴

Katz is a critical extension of *Silverman’s*. One weakness of *Sewell* and its progeny is that they do not speak to the problem posed when third parties—such as employees, onlookers, or clergy—interject ethnic hate speech. Arguably, it is unfair to strip the victor of his electoral triumph when he is not responsible for the slur. While this point has a certain corrective justice appeal, it does not withstand scrutiny. First, even if the prevailing party did not initiate the attack, he may well have benefited from the ethnic animosity the slur aroused against his opponent. To uphold such a tainted victory would thus constitute unjust enrichment regardless of who dealt the ethnic card.

Second, the key focus should be on the workers themselves, as opposed to the union or the employer. The decision whether to join a union is one of the most critical choices in a worker’s professional life. In addition to affecting material concerns such as wages, hours, and job security, voting is an essential statement of self-expression and collective empowerment. In light of the need to make free, informed, and rational decisions, workers are entitled to deliberate in a hate-free environment regardless of the speaker’s identity. Thus, the *Katz* doctrine represents a

⁷¹ 701 F.2d at 706.

⁷² *Id.* at 707-8 (quoting *Silverman’s*, 656 F.2d at 59 (quoting *Paula Shoe*, 121 N.L.R.B. at 676)).

⁷³ *Id.* at 707 (citing *Advertisers Manufacturing Co. v. NLRB*, 677 F.2d 544, 546 (7th Cir. 1982)).

⁷⁴ *Id.* at 709.

well-founded effort to ensure that workers cast ballots in elections that dignify the autonomy and gravity of their democratic choice.⁷⁵

Third-party anti-Semitism appeared again in *M & M Supermarkets v. NLRB*.⁷⁶ Here, a pro-union employee launched into an anti-Jewish speech during a meeting between several workers and the company's personnel director.⁷⁷ The employee angrily charged:

The damn Jews who run this Company are all alike. They pay us pennies out here in the warehouse, and take all their money to the bank. The Jews ought to remember their roots. [The company president] ought to remember his roots. Us blacks were out in the cotton field while they, the damned Jews, took their money from the poor hardworking people.⁷⁸

⁷⁵ Even *Katz*, however, is no guarantee that anti-Semitism will be deterred in every case. As the Seventh Circuit's recent opinion in *Clearwater Transport, Inc. v. NLRB*, 157 L.R.R.M. (BNA) 2281 (7th Cir. 1998), exemplifies, parties objecting to an election's validity still must make an affirmative showing that the ethnic smear may have had some impact on the election. In *Clearwater*, the Seventh Circuit upheld the Board's decision that an employee's Judeopathic slur did not breach laboratory conditions. As the court concluded, there was "a complete dearth of evidence to back up" the employer's claim that the employee's anti-Semitic remark to coworkers could have influenced the outcome of the election. *Id.* at 2287. Given *Clearwater's* recent vintage, it is unclear whether the opinion marks a doctrinal retreat by the Seventh Circuit, or merely a reminder that parties must do more than simply allege that an ethnic remark conceivably might have had some hypothetical impact on balloting.

⁷⁶ 818 F.2d 1567 (11th Cir. 1987).

⁷⁷ *Id.* at 1569.

⁷⁸ *Id.* *M & M* exemplifies how highly complex and sensitive the issue of anti-Semitism is among African-Americans, an issue which is beyond the purview of this Article. As one scholar explains, "[W]e know very little about the nature and extent of antisemitism in the black community." Jerome A. Chanes, *Interpreting the Data: Antisemitism and Jewish Security in the United States*, 28 *Patterns of Prejudice* 87, 96 (1994). For additional discussion of this subject, see Gregory Martire & Ruth Clark, *Anti-Semitism in the United States: A Study of Prejudice in the 1980s* 51-52 (1982) (explaining that increased black social contact with Jews does not, as is the case with whites, produce lower levels of anti-Semitism where the contact is often impersonal rather than social); Gertrude J. Selznick & Stephen Steinberg, *The Tenacity of Prejudice: Anti-Semitism in Contemporary America* 117-31 (1969) (positing that, due to unique social realities, blacks are more anti-Semitic than whites in the economic area); Stewart J. D'Alessio & Lisa Stolzenberg, *Anti-Semitism in America: The Dynamics of Prejudice*, 61 *Soc. Inquiry* 359, 363-64 (1991) (finding that race has negligible direct effects on anti-Semitism); Lee Sigelman, *Blacks, Whites, and Anti-Semitism*, 36 *Soc. Q.* 649 (1995) (stating that national surveys over the past 30 years indicate that "blacks are more negatively oriented towards Jews than . . . whites"); Ronald Tadao Tsukashima & Darrel Montero, *The Contact Hypothesis: Social and Economic Contact and Generational Changes in the Study of Black Anti-Semitism in Error Without Trial: Psychological Research on Antisemitism* 430-48 (Werner Bergmann ed., 1988) (suggesting that more intimate, equal-status contact between blacks and Jews may not significantly improve Black-Jew relations). A hopeful dialogue may be found in Michael Lerner & Cornel West, *Jews and Blacks: Let the Healing Begin* (1995).

The Board certified the union's victory in the election notwithstanding the employer's objections.⁷⁹ According to the Board's hearing officer, such remarks were not imputable to the union, were heard by only a few employees, and were not so inflammatory as to render a fair election impossible.⁸⁰ The Board, although claiming "that it has long been sensitive and responsive to deliberate attempts by parties to inject elements of racial and religious prejudice into a representation campaign,"⁸¹ upheld the hearing officer's decision. The Board based this ruling on its philosophy that "where racially prejudicial statements emanate from a third party, such statements warrant invalidating an election, only if they are so 'coercive and disruptive that a free expression of choice of representatives is impossible.'"⁸²

The Eleventh Circuit disagreed. Refusing to enforce the Board's order, the court reasoned that:

[The employee's] remarks were so inflammatory and derogatory that they inflamed racial and religious tensions against the Jewish owners of the company and destroyed the laboratory condition necessary for a free and open election. The record shows that [the employee's] remarks were made in front of three other employees. There were 17 employees in the bargaining unit, and the Union won the election by a vote of nine to seven, with two challenged ballots.⁸³

Given this finding, the court went on to hold that "the Board failed to apply the proper legal standard to determine whether [the employee's] remarks 'disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the representation election.'"⁸⁴ In making its decision, the court was careful to consider the potentially broader implications of allowing such racially or religiously motivated hate speech to continue unchecked:

We are mindful of our society's public intolerance of racial and religious discrimination as evidenced in our Civil

⁷⁹ See 818 F.2d at 1570.

⁸⁰ *Id.*

⁸¹ *Id.* at 1571.

⁸² *Id.* (quoting *NLRB v. Heavy Lift Serv., Inc.*, 607 F.2d 1121, 1123 (5th Cir. 1979) (quoting *Federal Elec. Corp. v. NLRB*, 539 F.2d 1043, 1044 (5th Cir. 1976))).

⁸³ *Id.* at 1573-74.

⁸⁴ *Id.* at 1574 (quoting *NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364, 1371 (5th Cir. 1980)).

Rights statutes. Although feelings of racial and religious bias may, unfortunately, be harbored personally, an appeal to such feelings has no place in our system of justice. Neither does it have any place in a union election if it unduly interferes with holding such an election under “ideal” or “laboratory” conditions⁸⁵

M & M offers a sensible solution to the difficulty presented by the ethnic hostility of employees and other third parties. The Board’s standard—that the speech must have rendered a fair election “impossible”—demands an infeasible level of proof. Logically, it is insuperably difficult to conclude that an occurrence is utterly impossible. Furthermore, workers are entitled to reasonable assurances of a fair and free election, not just the dim hope that one may take place against all odds. By steering attention back toward the goal of providing a rational, democratic atmosphere, the Eleventh Circuit cogently iterated the need to protect the workers’ franchise from hateful and distracting anti-Jewish cant.

*C. Shoemaker Without Soul: The Board’s
Continuing Lack of Vigilance*

The Board’s series of judicial reversals has not given it an enhanced sense of responsibility for ensuring the integrity of elections. To the contrary, the Board seems incorrigibly wed to a policy of nonintervention in campaigns marked by anti-Semitism. This administrative intransigence lends little hope for those dedicated to the ideal of clean, rational elections as envisioned in *General Shoe*.⁸⁶

Despite reversals by appellate courts in three different circuits, the Board implicitly continues to follow *Paula Shoe*.⁸⁷ In *Brightview Care Center, Inc.*,⁸⁸ the employer protested losing an election in which he allegedly had been the target of anti-Semitic remarks.⁸⁹ The regional director disagreed, arguing that there was no evidence the union was

⁸⁵ Id. at 1574 (citation omitted).

⁸⁶ For discussion of *General Shoe*, see supra notes 27-33 and accompanying text.

⁸⁷ For discussion of *Paula Shoe*, see supra notes 40-44 and accompanying text.

⁸⁸ 292 N.L.R.B. 352 (1989).

⁸⁹ Id. at 352. The alleged anti-Semitic remarks included “the owners would not give us raises because they were Jews and cheap,” and “maybe Hitler did the right thing.” Id. at 352 n.2.

responsible for such remarks, had run a racist campaign, or that the election atmosphere had been “permeated” by anti-Semitism.⁹⁰

As the employer correctly argued, this simply was not the proper standard. Citing *Sewell*, *Silverman's*, and *M & M* (among others), the employer emphasized that the relevant issue was not whether the union was responsible for the slurs, but whether the remarks “destroyed the atmosphere necessary to the exercise of free choice in the representation election.”⁹¹ Despite these valid points, the Board offered a multi-pronged rejection of the employer’s appeal. It attempted to distinguish each of the employer’s precedents, arguing that the slurs were disseminated by the employer in *Sewell*, by a union officer in *Silverman's*, and by an outspoken, union-supporting worker in *M & M*. In contrast, there was no evidence concerning the union sympathies of the alleged bigots in this case.⁹² Such distinctions are specious. The Board obstinately refused to acknowledge the unifying theme of these decisions: that workers deserve—and the Board should provide—elections free from the taint of hate-mongering, regardless of the speaker. *General Shoe* entitles workers to a reasonably clean democratic laboratory, not just one unmarked by the mud of either employers or unions.⁹³

The Board then replicated its *Paula Shoe* shuffle between “isolated” and “sustained” ethnic assaults:

In *Sewell*, the Board held that it would set aside elections when a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals. *Sewell* itself involved a party’s sustained course of conduct, deliberate and calculated in intensity, to appeal to racial prejudice. The Board in *Sewell* distinguished such conduct from isolated, casual,

⁹⁰ *Id.* at 352.

⁹¹ *Id.* It is noteworthy that, with the exception of *Sewell*, all the cases the employer relied upon were decisions by appellate courts rather than the Board.

⁹² *Id.*

⁹³ The Board frequently, for example, has invalidated elections in which the parties’ behavior was beyond reproach, but the Board’s own agent acted in a manner suggesting favoritism toward either management or the union. See, e.g., *Athbro Precision Eng’g Corp.*, 166 N.L.R.B. 966 (1967) (vacating election where Board agent drank beer with union representative during a break in the polling), vacated sub nom. *International Union of Elec., Radio & Mach. Workers v. NLRB*, 67 L.R.R.M. (BNA) 2361 (D.D.C. 1968), acq. in result, 171 N.L.R.B. 21 (1968), enforced, 423 F.2d 573 (1st Cir. 1970). For a detailed discussion of such third-party contamination, see John W. Teeter, Jr., *Keeping the Faith: The Problem of Apparent Bias in Labor Representation Elections*, 58 U. Cin. L. Rev. 909 (1990).

prejudicial remarks. The Board has adhered to this distinction.⁹⁴

Such logic rests on a fatal misreading of *Sewell*. *Sewell*, although stating that the Board will not set aside an election if a party “does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals,” emphasizes that the issue or statement must first be truthful.⁹⁵ The Board could have argued that an employee uttering “maybe Hitler did the right thing” was not part of a deliberate effort, but it is disingenuous to suggest the statement was either truthful, temperate, or germane as required by *Sewell*. Under *Sewell*, therefore, the election should have been overturned regardless of any fanciful line drawing between what is deemed “isolated” or “sustained.”⁹⁶

In *Benjamin Coal Co.*,⁹⁷ a complex case involving numerous unfair labor practices by the employer, the Board again shirked its duty to safeguard elections. After the union lost a second election,⁹⁸ it sought enforcement of a “*Gissel* bargaining order.”⁹⁹ The union based its request on the majority support it received in the first election and the employer’s pervasive unfair labor practices during the second campaign.¹⁰⁰ In response, the employer argued that a *Gissel* order was inappropriate

⁹⁴ *Brightview*, 292 N.L.R.B. at 352 (citations omitted) (quoting *Beatrice Grocery Prods., Inc.*, 287 N.L.R.B. 302, 302 (1987) (holding that a union representative’s accusation that a senior manager made anti-black remarks did not warrant vacating the election whether the accusation was true or false)).

⁹⁵ 138 N.L.R.B. at 71-72.

⁹⁶ Indeed, the Board chairman made essentially the same point in his dissent to *Beatrice Grocery*. 287 N.L.R.B. at 304-05 (emphasizing that “for a racial message to be permissible under *Sewell*, it must be *both* truthful and germane” and criticizing the majority’s diminution of the event as being “without effect”).

⁹⁷ 294 N.L.R.B. 572 (1989).

⁹⁸ The union had won the first election, but the employer filed numerous objections, and the union decided to consent to a new election instead of litigating the matter. *Id.* at 572 n.7.

⁹⁹ A *Gissel* order is labor law shorthand for a Board decision ordering an employer to bargain with a union “where an employer has committed . . . unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union’s majority and caused an election to be set aside.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969). *Gissel* orders are not automatic for any employer misconduct; they generally are reserved for egregious and pervasive violations of the Act. For a sobering analysis of the strengths and limits of *Gissel* orders, see Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 *Harv. L. Rev.* 1769, 1793-95 (1983).

¹⁰⁰ *Benjamin Coal*, 294 N.L.R.B. at 572. The employer’s unfair labor practices included coercive interrogation of employees regarding their support of the union, promising and providing benefits to employees conditioned on their rejection of the union, and physically assaulting an employee for supporting the investigation of unfair labor practices. *Id.* at 614.

because numerous anti-Semitic comments during the first election so tainted the result that it was unreliable as an expression of majority support for the union.¹⁰¹ In particular, the employer alleged that the union had made blatant appeals to anti-Semitism to propel its campaign.¹⁰²

The ALJ rebuffed this assertion in a manner exemplifying the Board's apparently ingrained refusal to deter anti-Semitic campaigns. Whereas *Paula Shoe* and its progeny held that Jew-bashing was *too isolated* to invalidate an election, here the ALJ concluded that anti-Semitism was *too widespread* for such a consequence. Pleading impotence in the face of history, the ALJ opined:

[I]t is nothing less than regrettable that workplace anti-Semitism has been rampant for many years in the Benjamin operation. Convincing evidence establishes that rank-and-file employees, foremen, and high-ranking management officials . . . were guilty of ethnic slurs against the Benjamins. Yet, the insulting and profane references contributed by prounion employees to this unfortunate history were not shown to have varied from the manner in which hostility, anger, and frustration were directed toward their employer over the years. The entire phenomenon might well be categorized as impassioned obscenity, rather than a calculated effort to exacerbate racial or religious feelings. However disgraceful these remarks, there is no basis for finding that the Union was responsible for them.

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The ALJ's excuse is disconcerting, for the Board compounds insensitivity with inconsistency when it attempts to have it both ways: either anti-Semitism is too minimal to warrant treatment or it is too metastasized to be surgically corrected. In neither instance has the Board shown the courage and concern to engage in the admittedly difficult yet important task of taking concrete action—such as invalidating elections—to stem the use of anti-Jewish campaign tactics.

The Board, not surprisingly, fully embraced the ALJ's approach. The Board emphasized that these were third-party remarks and that union

¹⁰¹ *Id.* at 572.

¹⁰² *Id.* at 610. The decision does not detail what these comments were.

¹⁰³ *Id.* at 611.

officials did not “echo or condone these highly offensive sentiments.”¹⁰⁴ The Board then argued:

To hold that the election was tainted by such prejudice would be to hold that no election could ever be held in any plant with a prejudiced work force unless the union attempting the campaign were able to accomplish what management itself had been unable to do before the union came on the scene, namely, eliminate all expressions of racial, ethnic, or religious bias.¹⁰⁵

This argument is utterly hollow. Admittedly, labor law is not for the squeamish,¹⁰⁶ and elections will never be certifiably free from the vagaries of human prejudice. The immediate objective, however, is not to transform workers into champions of ethnic harmony, but to ensure that anti-Semitism is vigorously deterred as a campaign tool. To abort this mission on the grounds that perfection eludes us is an abdication of the Board’s duty to protect the workers’ freedom to make deliberate, rational determinations of their organizational status.

The Board, unfortunately, is not the sole transgressor in neglecting the laboratory. In contrast to other jurisdictions, the Ninth Circuit adopted the Board’s do-nothing philosophy in *Did Building Services, Inc. v. NLRB*¹⁰⁷ Once again, an employer challenged the union’s election victory because of anti-Jewish rhetoric,¹⁰⁸ and once again the Board trivialized the employer’s complaint. Here, a vocal union-supporting employee allegedly told a supervisor “that the Mexicans should get together and that the Union would protect them against gringos and Jews, that those people never do anything for the workers, and that the Union is for the poor

¹⁰⁴ *Id.* at 573.

¹⁰⁵ *Id.*

¹⁰⁶ For a humorous yet disturbing account of life in the field, see Lee Modjeska, *Reflections of a Labor Lawyer*, 8 *Lab. Law.* 1 (1992). As Modjeska describes it,

Labor practice demands unique skills. Unrecorded labor history has it, for example, that John L. Lewis, former president of the United Mine Workers, regarded a “cast-iron ass” as the prime requisite of a good negotiator. Dissembling qualities are also vital, as in “this is absolutely our last and final offer,” or “we had no idea he was a union activist when we fired him.” In particular settings, the abilities to tolerate thick smoke and raw bourbon are essential. Further, racial, ethnic, sexual and religious sensitivities are sorely tested.

Id. at 2.

¹⁰⁷ 915 F.2d 490 (9th Cir. 1990).

¹⁰⁸ *Id.* at 491.

people and for the Mexicans . . .”¹⁰⁹ This remark allegedly was made shortly before the election and purportedly was heard by several coworkers.¹¹⁰ Other workers also testified that this employee liked to characterize the employer as a Jew who was exploiting the workers.¹¹¹

The hearing officer discounted most of this and similar testimony and decided that none of the slurs had impaired the voters’ freedom of choice.¹¹² The Board agreed, stating:

[T]he comments made by [the] employee . . . are troubling and we certainly do not condone the use of such terms occurring in the context of a Board conducted election. However, here the evidence as credited by the Hearing Officer establishes that the comments were made on a single occasion by a pro-union employee in a manner that could not reasonably create the appearance that his remarks represented the views of the Union; and there is no evidence that the Union had notice that he had made such remarks, so its failure to repudiate them has no significance. Under these circumstances, we find no basis for setting aside the election¹¹³

On review, the Ninth Circuit acknowledged that the anti-Semitic remarks were “reprehensible and could not conceivably have been germane to any legitimate election issue.”¹¹⁴ Indeed, such slurs “sought to set the Mexican employees against the ‘gringo,’ Jewish owner.”¹¹⁵ Nonetheless, the court upheld the Board’s conclusion. The Ninth Circuit stressed that the employee’s remarks were “isolated,” that he “held no position of influence over his co-workers,” and that the union never ratified his attacks.¹¹⁶ Most importantly, the court announced that, “[t]o require election invalidation, an employee’s appeal to prejudice must so

¹⁰⁹ *Id.*

¹¹⁰ *Id.* The supervisor also testified that he had overheard the employee making anti-Jewish comments to two other workers. *Id.*

¹¹¹ *Id.* at 492.

¹¹² *Id.* at 492-93.

¹¹³ *Id.* at 493.

¹¹⁴ *Id.* at 498.

¹¹⁵ *Id.* at 499.

¹¹⁶ *Id.* at 499-500.

taint the election atmosphere as to render free choice of representation impossible.”¹¹⁷

Did falters on numerous levels. First, it repeats the *Paula Shoe* mistake of suggesting that some unspecified level of anti-Jewish propaganda is acceptable so long as it arguably may be labeled “isolated,” “solitary,” or a “mere mention.” This is disheartening to those seeking clean elections where voters rationally cast ballots based on an informed calculus of their economic and other work-related interests. Second, the Ninth Circuit failed to grasp that the speaker’s non-supervisory status may well have amplified the impact of his remarks. Unlike employers and unions, whom workers may view with suspicion, a rank-and-file employee may enjoy an intimacy with coworkers that adds both urgency and plausibility to his slurs. Third, the union’s innocence does not alter the reality that its victory occurred in a setting illegitimized by ethnic libel. Fourth, the court’s adoption of an “impossibility” standard effectively would guarantee that no elections could ever be overturned based on a third party’s racist campaign tactics.

Did proved to be an aberration among appellate opinions, however,¹¹⁸ and the Ninth Circuit itself took a better-reasoned approach in *NLRB v. National Research Group, Inc.*¹¹⁹ In *National Research Group*, pro-union employees left threatening, obscene, and anti-Semitic messages on the answering machine of a group of anti-union coworkers. The Board overruled the employer’s objection to the union’s electoral victory and certified the results.¹²⁰ The Ninth Circuit, however, concluded that this alleged misconduct merited an evidentiary hearing and refused to enforce the Board’s bargaining order.¹²¹ Upon remand, an ALJ ruled that the

¹¹⁷ *Id.* at 498 (emphasis added) (footnote omitted).

¹¹⁸ At first glance, it appears that *NLRB v. Carl Weissman & Sons, Inc.*, 849 F.2d 449 (9th Cir. 1988) (per curiam), enforcing Case 19-CA-18672, 1987 WL 90210 (FLB-NLRB) (N.L.R.B. Feb. 5, 1987), is a second instance where the Ninth Circuit condoned the Board’s attitude towards anti-Semitic campaign tactics. However, on closer examination, it is clear that the court’s opinion in *Weissman* was not based on a substantive approval of the Board’s rationale for accepting the election results. In *Weissman*, the Ninth Circuit enforced the Board’s decision not to grant a hearing on the employer’s objections to the election results. *Id.* at 452. The Board had invalidated the first election because of a union official’s anti-Semitic remark, *id.* at 450, but then decided to hold the rerun election a mere sixty-seven days after the slur was uttered, *id.* at 452. When the union again prevailed, the employer asserted that the Board had not allotted sufficient time for the prejudicial taint to dissipate. *Id.* at 451. The Board tersely rejected that claim, however, and the Ninth Circuit enforced the rejection, ruling that it was not an abuse of discretion for the Board to refuse to hold a hearing concerning the employer’s assertions. *Id.* at 452.

¹¹⁹ No. 92-70701, 1994 U.S. App. LEXIS 7173 (9th Cir. Apr. 5, 1994) (mem.).

¹²⁰ Case 31-CA-19306, 1992 NLRB LEXIS 951 (N.L.R.B. Aug. 10, 1992).

¹²¹ 1994 U.S. App. LEXIS 7173, at *3.

election should be vacated. As he explained, the anti-Semitic slur, when combined with the threats, “tended to create a general atmosphere of fear and coercion.”¹²² Unfortunately, the ALJ did not address whether the slur, taken by itself, would have constituted a breach of laboratory conditions.

The Board’s 1995 opinion in *Catherine’s, Inc.*¹²³ offers further evidence that the Board’s weakness may be incorrigible. Here, the crux of the employer’s objection centered on a union representative’s comments at a campaign meeting with several dozen workers. A worker asked if the employer’s attorney was Jewish and the union representative responded affirmatively.¹²⁴ The representative then added “that it had been [his] experience over the years as a union rep that Jewish people would fight you and they would fight you hard, but when you beat them, they would sit down and negotiate a contract with you.”¹²⁵

The hearing officer found this unobjectionable. While conceding that the union representative’s remarks were “politically incorrect,” he concluded that they did “not rise to the level of religious slurs” and, in an ironic way, could even be viewed as a compliment to Jews.¹²⁶ He therefore recommended that the employer’s objection be dismissed, and the Board affirmed that decision.¹²⁷ The hearing officer’s analysis reflects an inadequate understanding of the insidious nature of prejudice. *Any* stereotype is potentially destructive, for by definition it strips the target of his or her individuality. The ethnicity of the employer’s attorney was not conceivably germane to the election, and the union representative only worsened the impact of the worker’s query by using stereotypes in his response.

Furthermore, the union representative’s supposed “compliment” must be appraised as part of the broader anti-Semitic overtones running through the campaign. For example, an employee swore under oath that the union representative gratuitously remarked that the employer was Jewish, that either the union representative or another worker claimed Jews disliked whites and blacks, and that such statements prompted widespread discussion among employees.¹²⁸ Indeed, yet another worker testified that

¹²² Case 31-CA-19306, 1995 NLRB LEXIS 228, at *10 (N.L.R.B. Mar. 13, 1995).

¹²³ 316 N.L.R.B. 186 (1995).

¹²⁴ *Id.* at 186.

¹²⁵ *Id.*

¹²⁶ *Id.* at 189-90.

¹²⁷ *Id.* at 186, 190.

¹²⁸ *Id.* at 187.

fellow workers endorsed black solidarity with statements laden with anti-Semitic overtones:

[The employee] testified that prior to the union campaign, no one at Catherine's had ever said anything to the effect that black employees had to stick together against white employees in the workplace. [The employee] also testified, that during the campaign, [a coworker] made remarks concerning Catherine's' chairman, Bernard Wein, "Well, he's Jewish. He don't care. He's got his pockets full. You're the one who need [sic] to try to make some money."¹²⁹

The hearing officer confessed that he had "no basis for discrediting" that testimony but found it lacked legal significance.¹³⁰ He proceeded to quash this objection because the union never authorized, condoned, or echoed such slurs.¹³¹

Once again, this resolution avoids the overarching issue. Regardless of the union's stance, it is unquestionable that the campaign was corrupted by stereotypes, race-baiting, anti-Jewish rhetoric, and other statements which were neither truthful, temperate in tone, nor germane. To uphold the election's results under these circumstances does violence to both *Sewell* and *General Shoe*.

III. MYSTERIES OF INTERPRETATION

The Board's approach to anti-Semitic campaign tactics has been a study in indifference. Despite its disapproving rhetoric, the Board almost uniformly has failed to deter the use of anti-Jewish propaganda in representation elections. The Third,¹³² Seventh,¹³³ Ninth,¹³⁴ and Eleventh Circuits¹³⁵ have shown greater sensitivity, but the Board's nonacquiescence in those judicial decisions undermines their prophylactic value. Instead of consistent administrative vigilance, parties seeking to vindicate the integrity of elections must depend on the episodic, case-by-case intervention of the circuit courts.

¹²⁹ Id. at 188.

¹³⁰ Id.

¹³¹ Id. at 189 (citing *Benjamin Coal Co.*, 294 N.L.R.B. 572 (1989)).

¹³² See *supra* notes 53-64 and accompanying text.

¹³³ See *supra* notes 65-75 and accompanying text.

¹³⁴ See *supra* notes 119-122 and accompanying text.

¹³⁵ See *supra* notes 76-85 and accompanying text.

The Board's apparent indifference to anti-Jewish campaign tactics raises an obvious question: Is such a lack of concern confined to anti-Semitism or does it extend to other forms of group disparagement? The answer is difficult to ascertain because the Board's overall application of *Sewell* has not been consistent.¹³⁶ Furthermore, the Board has drawn a rather tenuous line between what it considers an acceptable appeal to racial solidarity and what it views as impermissible race-baiting.¹³⁷ Anti-Semitism, however, does seem to be treated in a particularly cavalier fashion. Whereas the Board repeatedly has voided other ethnically inflamed elections,¹³⁸ it almost uniformly has done nothing to deter anti-Jewish ploys. No simple answer for this phenomenon is available, but several theories may offer at least a partial explanation.

First, one must recognize that the Board's failure to address anti-Semitism within the workplace with the care it deserves manifests a larger cultural failing. Such malign neglect is equally discernable in organizational behaviorism and human-resource management scholarship. As Professor Korman observes, "Anti-Semitism in the work setting has been a 'non-topic' in the fullest sense of the word" among such experts.¹³⁹

¹³⁶ See, e.g., Robert E. Williams, *NLRB Regulation of Election Conduct* 107 (rev. ed. 1985) (concluding that "[t]he continuing discrepancy between actual results and the language of *Sewell* creates uncertainty over Board policy"); Charlotte LeMoyne, Comment, *The Unresolved Problem of Race Hate Speech in Labor Union Elections*, *Geo. Mason U. Civ. Rts. L.J.* 77, 96-97 (1993) (observing that *Sewell* has been "difficult to apply" and has led to "inconsistent condemnation and affirmation of similar types of speech").

The Board's ambivalence about the impact of ethnic and racial disparagement is reflected in its conflicting approaches to efforts to arouse anti-Japanese sentiments. In *YKK (USA) Inc.*, 269 N.L.R.B. 82 (1984), the Board vacated an election based on the union's racist diatribes and acts of violence, whereas it permitted a subtler yet similar strategy in *KI (USA) Corp.*, 309 N.L.R.B. 1063 (1992), enforcement denied, 35 F.3d 256 (6th Cir. 1994).

¹³⁷ See, e.g., *Archer Laundry Co.*, 150 N.L.R.B. 1427 (1965) (upholding election despite the union's caricature of the employer as a "fat white man" and implication conveyed in a number of pamphlets that only an "Uncle Tom" would oppose unionization).

¹³⁸ This has been true both prior to and after its decision in *Sewell*. See, e.g., *YKK (USA) Inc.*, 269 N.L.R.B. 82 (1984) (vacating election as a result of anti-Japanese activities); *Caribe Gen. Elec., Inc.*, 175 N.L.R.B. 773 (1969) (vacating election as a result of anti-Puerto Rican comments); *Bush Hog, Inc.*, 161 N.L.R.B. 1575 (1966) (vacating election based on a finding that anti-black comments were made), enforced, 405 F.2d 755 (5th Cir. 1968); *Universal Mfg. Corp. of Miss.*, 156 NLRB 1459 (1966) (vacating election as a result of anti-black propaganda); *Boyce Mach. Corp.*, 141 N.L.R.B. 756 (1963) (vacating election as a result of anti-white statements); *Associated Grocers of Port Arthur, Inc.*, 134 N.L.R.B. 468 (1961) (vacating election as a result of anti-black comments); *Southern Car & Mfg. Co.*, 106 N.L.R.B. 144 (1953) (vacating election as a result of implied threats to black employees); *P. D. Gwaltney, Jr. & Co.*, 74 N.L.R.B. 371 (1947) (vacating election on grounds that threats of revival of Ku Klux Klan contributed to coercion of black employees).

¹³⁹ See Abraham K. Korman, *Anti-Semitism in Organizations and the Behavioral Sciences: Towards a Theory of Discrimination in Work Settings*, 9 *Contemp. Jewry* 63, 76 (1988).

The Board thus lacks any empirical matrix against which to assess Judeopathic behavior in representation elections.¹⁴⁰ Furthermore, there is a lack of visibility: anti-Semitism has not received the same level of public attention as discrimination against people of color. In fact, "there has been a virtually total lack of interest in anti-Semitism by the major civil-rights groups in this country."¹⁴¹ Finally, the common perception (regardless of its accuracy) that Jewish Americans are relatively affluent may temper the indignation aroused by anti-Semitism. This may be attributable to a specious sense that Jews have the economic muscle to defend their interests and thus need little protection.¹⁴² Such an attitude, however lamentable, may be exacerbated when the target of such abuse is a Jewish employer.

These explanatory factors cannot excuse the Board's performance, and it is pure speculation what role, if any, they have played in particular cases. It would be unduly sanguine, however, to believe the Board is immune from the misperceptions and attitudinal assumptions that permeate American culture. As Roberto Unger has recognized, any bureaucracy must "draw its staff and its purposes" from society and will

¹⁴⁰ Of course, even if such studies existed, there is no guarantee that the Board would consult them. As Professor Edley states:

The National Labor Relations Board is an especially easy target for skeptics of agency expertise, consistency and neutrality. From its inception, the controversial nature of the NLRB's business has subjected it to attack, and not without reason. With respect to expertise, it has been observed that courts routinely incant that the board is expert in industrial relations, so that it can evaluate the effects of suspect management actions on workers; yet the board does no empirical work, nor does its staff include experts in social science, industrial relations, or business administration who might ably address such questions.

Christopher F. Edley, Jr., *Administrative Law: Rethinking Judicial Control of Bureaucracy* 51 (1990).

¹⁴¹ Korman, *supra* note 139, at 80. Korman adds that "[n]o group now exists which devotes a major effort to dealing with work-related anti-Semitism, there have been no conferences or meetings on the topic, and there have been few publications devoted to increasing the work opportunities of members of the Jewish community." *Id.* at 80-81. See also Stephen L. Slavin & Mary A. Pradt, *The Einstein Syndrome: Corporate Anti-Semitism in America Today* 169 (1982) (asserting that the effort of Jewish organizations to combat workplace anti-Semitism "has been applied infrequently, inconsistently, and to only a minimal effect").

¹⁴² Korman characterizes this attitude as, "[W]hy be concerned if the person has money, even if it is unfair that he or she is being discriminated against?" Korman, *supra* note 139, at 81. Korman goes on to note "that Jews' supposed lack of economic need is for the most part an inaccurate perception of the actual economic status of American Jews." *Id.* See also Alan M. Dershowitz, *Chutzpah* 3 (1991) (asserting that American Jews "worry about charges . . . of being too rich"); Slavin & Pradt, *supra* note 141, at 1 (noting the ill-conceived sentiment that "since Jews are apparently doing quite well economically, perhaps they should just count their blessings and thank God to be living in the land of opportunity").

therefore reflect and reinforce that community's patterns of domination and dependence.¹⁴³ On some level, therefore, the fault lies not with the Board but in ourselves.¹⁴⁴

CONCLUSION

Although the roots of the Board's recurrent failures may be difficult to discern, there are four fundamental flaws in its reasoning that readily can be addressed. First, the Board dogmatically has adhered to the misconception it displayed in *Paula Shoe*¹⁴⁵ that some unspecified level of anti-Semitism is tolerable so long as it is sufficiently casual or isolated. This "little bit won't hurt" complacency embodies an appalling lack of empathy for the targets of racist jibes, and it seems particularly callous toward what has been described as "the most vilified and persecuted minority in history."¹⁴⁶ The *Paula Shoe* standard is also unacceptably imprecise. There is no clear indication of when ethnic slurs reach such a pitch that they can no longer be ignored or dismissed with a pious lecture. Such vagueness only begets uncertainty and generates litigation.¹⁴⁷ The *Sewell* standard,¹⁴⁸ that elections will be upheld when they include the use of racial propaganda only if the statements are truthful, germane, and temperate in tone,¹⁴⁹ is a far clearer approach to the difficulties posed by the use of racial propaganda in representation elections.

The Board's second primary error has been to apply an unobtainable standard for invalidating elections based on third-party hate tactics. By repeatedly holding that third-party bigotry will invalidate elections only where it renders a free choice "impossible," the Board has given virtual carte blanche to Judeopathic workers and others not formally aligned with the employer or the union. To impose a standard that the victims of anti-Semitism never can reach is both senseless and legally unjust.

¹⁴³ Roberto Mangabeira Unger, *Law in Modern Society* 60-61 (1976).

¹⁴⁴ The Supreme Court may bear some culpability as well. Despite the critical nature of this problem and the intransigent doctrinal conflict, the Court has never addressed the issues raised by *Sewell*.

¹⁴⁵ For discussion of *Paula Shoe*, see supra notes 40-44 and accompanying text.

¹⁴⁶ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

¹⁴⁷ See, e.g., Richard A. Posner, *Economic Analysis of Law* 511 (3d ed. 1986).

¹⁴⁸ For discussion of *Sewell*, see supra notes 34-38 and accompanying text.

¹⁴⁹ *Sewell*, 138 N.L.R.B. at 71-72.

The Board's third transgression is to ignore its own culpability. By certifying racism-ridden elections, the Board enables anti-Semites. Simple vows of disapproval count for nothing in the face of a refusal to invoke available means of redress and deterrence. There can be no genuine reproach in the absence of a concrete remedy. As one writer has commented, "[I]f we do not reproach those who are slandering, we ourselves are slanderers."¹⁵⁰

Fourth, the Board continues to ignore the serious nature of this issue; this is not mere quibbling over faux pas. The Board's lack of vigilance raises concerns over its commitment to both ethnic tolerance and shop-floor democracy. There is no room to accommodate malign neglect; we need "uncompromising opposition to the considerable anti-Semitism that . . . still exists today."¹⁵¹

Society cannot always reach the hearts and minds of Judeopaths.¹⁵² Certainly, however, it can limit their role in labor representation elections. Where the employer or union is responsible for an ethnic slur, the solution is simple: it should suffer the automatic, per se invalidation of any election it wins. Such a flat, prophylactic rule would clarify the *Sewell* doctrine, reduce litigation, and send the most potent message that anti-Jewish appeals are intolerable.

In cases involving third-party slurs, the Board should adopt and refine the *Katz* standard of "whether the inflammatory remarks *could have* impaired the employees' freedom of choice in the subsequent election."¹⁵³ This standard is not, of course, perfect; reasonable minds might differ as to the likelihood that anti-Jewish tactics will undermine workers' deliberative abilities. It is beyond question, however, that the standard enunciated in

¹⁵⁰ Fred M. Zaitso, *Living Victoriously* 54 (1995). In its defense, the Board might assert that at least it does not prevent Jewish targets from exercising self-help. In *Englewood Hosp.*, 318 N.L.R.B. 806 (1995), a company president informed employees that he had received an anonymous letter of a grossly threatening and anti-Semitic nature. The president did not blame the union for the letter, but he did express his understandable anger and noted that the "environment that created animosity between employees" could be responsible. *Id.* at 806. In a divided opinion, the Board overruled the hearing officer and held that the president had not run afoul of *Sewell*. *Id.* at 807. As the Board noted, the president's remarks clearly "did not attack a particular racial, ethnic, or religious group" and thus were unobjectionable. *Id.* Any other result arguably would constitute blaming the victim. Regardless, the Board's acceptance of the employer's self-defense in no way excuses its own failure to deter anti-Semitism.

¹⁵¹ Gary E. Rubin, *A No-Nonsense Look at Anti-Semitism*, *Tikkun*, May-June 1993, at 46, 82.

¹⁵² As one realist puts it, "Antisemites do not fade away; they simply die." Jerome A. Chanes, *Interpreting the Data: Antisemitism and Jewish Security in the United States*, 28 *Patterns of Prejudice* 87, 90 (1994).

¹⁵³ 701 F.2d at 707 (emphasis added) (citation omitted). *Katz* is discussed *supra* at notes 65-75 and accompanying text.

Katz is a critical improvement over the Board's current approach to third-party slurs. The Board uses an "impossibility" standard that shields such slurs from effective redress, whereas the *Katz* standard uses a common sense test of possibility. If the slurs conceivably "could have" undermined the democratic process, then a new election must be held.

To assure maximum effectiveness, the party defending the election's legitimacy should bear the burden of proving that the Judeopathic tactics could not have undermined the workers' freedom of choice. This allocation would strengthen both parties' incentives to discourage anti-Semitic outbursts and would be consistent with the spirit of *Sewell*.¹⁵⁴ More importantly, it would leave little room for artful dodging by anti-Semites.

The *Katz* standard also supports the concern for laboratory conditions.¹⁵⁵ In third-party cases, the goal should be less to hand down retribution than to correct a critically flawed experiment in industrial democracy. Holding new elections entails both public and private costs, but such expenditures would not be prohibitive in view of the purposes they would serve. That democracy and ethnic tolerance would both be furthered is by no means coincidental. No fair system of representation can exist if the underlying process is corrupted by ethnic or religious hatred. It is time to discard the hole-ridden *Paula Shoe* and step, however modestly, toward a world where we are all judged as individuals, and not on the basis of the ethnic groups from which we come.

¹⁵⁴ 138 N.L.R.B. at 72 (explaining that "the burden will be on the party making use of a racial message to establish that it was truthful and germane, and . . . the doubt will be resolved against him").

This allocation also would be consistent with the general treatment of equal protection jurisprudence, which provides an informative parallel for the potential treatment of anti-Semitism. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), where the Supreme Court explained that:

Proof that the decision by the [defendant] was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the [defendant] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

Id. at 270-71 n.21.

¹⁵⁵ For discussion of the concern for laboratory conditions, see *supra* text accompanying note 33.