Title I of the Labor Management Relations Act ("LMRA"),\(^1\) or the Taft-Hartley Act,\(^2\) was originally enacted, and is still commonly referred to, as the National Labor Relations Act ("NLRA")\(^3\) or the Wagner Act.\(^4\) The

\(^1\) B.B.A., J.D., University of Iowa; Shareholder, Ryley Carlock & Applewhite, Phoenix, Arizona; Chairman, Arizona Agricultural Employment Relations Board.


\(^4\) See Amoco Oil Co., 554 F.2d at 776 (noting that the NLRA is "popularly referred to as the Wagner Act"). This reference is to the NLRA's principal sponsor, Senator Robert
NLRA (or the “Act”) is the most comprehensive labor management legislation ever enacted in this country. It reflects Congress’s attempt to promote collective bargaining as an instrument for achieving “industrial democracy.” In furtherance of this objective, the Act requires an employer to bargain with the representative of a majority of its employees, which in most cases means a union.


5. See Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) (describing the NLRA as “our most comprehensive national labor scheme”); cf. B. Glenn George, Divided We Stand: Concerted Activity and the Maturing of the NLRA, 56 Geo. Wash. L. Rev. 509, 511 (1988) (describing the NLRA as “the first comprehensive legislation creating and protecting employee rights”). The NLRA is also one of Congress’s most controversial enactments. See Wiltse, 188 F.2d at 923 (“For the [first] fifteen years [after] its passage by Congress, the National Labor Relations Act... aroused perhaps more controversy than any statute enacted during that period.”); cf. U. S. v. Nat’l Eng’rs Beneficial Ass’n, 294 F.2d 385, 391 (2d Cir. 1961) (observing that many of the Taft-Hartley amendments to the NLRA were highly controversial).

6. See NLRB v. U.S. Sonics Corp., 312 F.2d 610, 615 (1st Cir. 1963) (indicating that “the basic philosophy of the Act... is the encouragement of collective - as opposed to individual - bargaining”). In this context, collective bargaining refers to “bargaining by an organization or group of workmen on behalf of its members with the employer.” Thomas v. LTV Corp., 39 F.3d 611, 618 (5th Cir. 1994) (citation omitted). The NLRA itself states:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .


8. NLRB v. Band-Age, Inc., 534 F.2d 1, 7 (1st Cir. 1976) (Campbell, J., dissenting). See also Cox v. C.H. Masland & Sons, Inc., 607 F.2d 138, 141 (5th Cir. 1979) (“In order to achieve the collective bargaining recognized by the Act as national labor policy, . . . the statutory plan permits a majority of the employees in a [bargaining] unit to elect a union to serve as their collective bargaining agent.”); Fusco v. Richard W. Kaase Baking Co., 205 F. Supp. 465, 474 (N.D. Ohio 1962) (“It is settled that the basic purpose of . . . the National Labor Relations Act, as amended, is to preserve to employees the freedom of choosing their own representative for the purpose of collective bargaining.”).

9. See Brown v. Sterling Aluminum Prods. Corp., 365 F.2d 651, 657 (8th Cir. 1966) (“Section 159(a) of the Act designates the representatives selected by a majority of the employees in a [bargaining] unit, which in most cases would be a Union, to be the exclusive elected representatives of all the employees in that unit for the purposes of collective bargaining.”) (internal punctuation omitted); In re Allis-Chalmers Mfg. Co., 70 N.L.R.B. 348,
The designation of employee bargaining representatives is ordinarily accomplished through representation elections,\(^10\) which are provided for in Section 9 of the NLRA.\(^11\) Because the Act contemplates that employees will have “complete and unfettered freedom of choice” in selecting their bargaining representatives,\(^12\) the National Labor Relations Board (“NLRB” or the “Board”)\(^13\) requires that these elections be held under “laboratory conditions.”\(^14\) This somewhat controversial standard\(^15\) is not a literal requirement,\(^16\) but it does require that representation elections be conducted in

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349 (1946) (describing unionization as a “necessary concomitant” to collective bargaining).

10. See United Dairy Farmers Coop. Ass’n v. NLRB, 633 F.2d 1054, 1067 (3d Cir. 1980) (“The [Supreme] Court has noted the ‘acknowledged superiority of the election process’ as a method for selecting a majority representative of employees.”) (quoting NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969)). However, a union’s majority status may be shown by means other than the holding of an election. See L.T.T. Semi-Conductors, Inc. v. NLRB, 395 F.2d 257, 259 (5th Cir. 1968). For example, “union authorization cards, if obtained from a majority of employees without misrepresentation or coercion, are reliable enough generally to provide a valid, alternative route to majority status. . . .” Gissel Packing, 395 U.S. at 579.


13. The Board is the federal agency charged with responsibility for administering the NLRA. 29 U.S.C. §§ 153-56, 159-61, 164(c) (2001); Rochester Joint Bd. v. NLRB, 896 F.2d 24, 28 (2d Cir. 1990); ITT Lamp Div. of Int’l Tel. & Tel. Corp. v. Minter, 435 F.2d 989, 992 (1st Cir. 1970). In the election context, “Congress has entrusted a wide degree of discretion to the Board to establish the procedures necessary to insure the fair and free choice of bargaining representatives.” Midland Nat’l Life Ins. Co., 263 N.L.R.B. 127, 131 (1982) (citation omitted).

14. See In re Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948) (“In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.”); see also Med. Ancillary Servs., 212 N.L.R.B. 582, 584 (1974) (Penello, J. dissenting) (observing that “the Board, in General Shoe Corporation, adopted its ‘laboratory conditions’ rationale”).

15. See Lewis, 217 N.L.R.B. 239, 240 (1975) (Penello, J. dissenting) (“The Board has been criticized for insisting on its ideal ‘laboratory conditions’ standard.”) (quoting Home Town Foods, Inc. v. NLRB, 416 F.2d 392, 399 n.16 (5th Cir. 1969)); Med. Servs., 212 N.L.R.B. at 585 (Penello, J. dissenting) (“I submit that under the guise of maintaining laboratory conditions we are treating employees not like mature individuals capable of facing the realities of industrial life and making their own choices but as retarded children who need to be protected at all costs.”); N.Y. Shipping Ass’n, 108 N.L.R.B. 135, 139 (1954) (“We are inclined to regard the language . . . from the General Shoe decision . . . as something less than felicitous.”)

16. See Amalgamated Clothing & Textile Workers Union v. NLRB, 736 F.2d 1559, 1562 (D.C. Cir. 1984) (“Although the ‘laboratory conditions’ standard represents a noble ideal, it must be applied flexibly, for in its extreme form it is a standard that ‘no seasoned observer considers realistic.’”) (quoting Derek C. Bok, The Regulation of Campaign Tactics
"an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice."

Certain conduct by an employer (and occasionally a union) occurring during the critical pre-election period can destroy these laboratory condi-

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in Representation Elections Under the National Labor Relations Act, 78 HARV. L. REV. 38, 45 (1964)); Newport News Shipbuilding & Dry Dock Co., 239 N.L.R.B. 82, 90 (1978) ("[A]lthough the Board aspires to laboratory conditions in [an] election, it is recognized that clinical asepsis is an unobtainable goal in the real world of union organizational efforts.") (footnotes and internal quotation marks omitted), enforcement denied, 594 F.2d 8 (4th Cir. 1979); N.Y. Shipping Ass'n, 108 N.L.R.B. at 139 ("We should not think in terms purely academic of ideal laboratory experiments or 'requisite laboratory conditions' in appraising [an] election . . . ."). With respect to this issue, the Board has stated:

In deciding whether the registration of a free choice is shown to have been unlikely, the Board must recognize that Board elections do not occur in a laboratory where controlled or artificial conditions may be established. We seek to establish ideal conditions insofar as possible, but we appraise the actual facts in the light of realistic standards of human conduct. It follows that elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards.

Liberal Mkt., Inc., 108 N.L.R.B. 1481, 1482 (1954); see also Midland Nat'l Life Ins. Co., 263 N.L.R.B. at 130 (noting with approval "the understanding and realism espoused in Liberal Market").


18. See Home Town Foods, 416 F.2d at 397 n.9 (asserting that "the Board should apply a single standard against which it will measure the campaign conduct of all parties who might have interfered with employee free choice"); 1 THE DEVELOPING LABOR LAW 366 (Patrick Hardin ed., 3d ed. 1992) ("Generally, the same standards of pre-election conduct apply to both employers and unions."). As one Board administrative law judge has stated:

In the minds of prospective voters, misdeeds by competing parties do not erase or neutralize each other, as an alkali neutralizes an acid. Indeed, such conduct by a union, where found, compounds rather than nullifies employer misconduct, and minimizes rather than improves the likelihood that an election will produce a free and untrammeled employee choice.


19. In Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275, 1278 (1961), the Board defined this as the period between the filing of an election petition (see infra notes 36-41 and accompanying text) and the holding of the election itself. One court has noted that "[t]he Board focuses on this time period because it believes that the possibility of improper coercion or influence on employee choice is then at its highest, thus justifying special scrutiny of employer actions." NLRB v. Wis-Pak Foods, Inc., 125 F.3d 518, 521 (7th Cir. 1997). For a discussion of employer conduct during the pre-election period, see Bernard T. King, Pre-Election Conduct—Expanding Employer Rights and Some New and Renewed Perspectives, 2 INDUS. REL. L.J. 185 (1977).
CORRECTIONS BEFORE REPRESENTATION ELECTIONS

20. See, e.g., Tipton Elec. Co. v. NLRB, 621 F.2d 890, 899 (8th Cir. 1980) (finding that an employer's actions during a union election campaign "clearly had the effect of... destroying the laboratory conditions necessary for a fair election"); Black Hills & Western Tours, Inc., 321 N.L.R.B. 778, 794 (1996) (discussing employer conduct that "naturally tended to destroy the laboratory conditions under which representation elections should be conducted").

21. Unsatisfactory conditions for holding elections may be created by promises of benefits, threats of economic reprisals, deliberate misrepresentations of material facts by an employer or a union, deceptive campaign tactics by a union, or by a general atmosphere of fear and confusion caused by a participant or by members of the general public. Sewell Mfg. Co., 138 N.L.R.B. at 70 (footnotes omitted).

22. Employer unfair labor practices are defined in section 8(a) of the Act. 29 U.S.C. § 158(a) (2001). See also Hobbs v. Hawkins, 968 F.2d 471, 478 (5th Cir. 1992) ("Section 8(a) makes it an unfair labor practice... for an employer to do any of five things."). In the present context, they typically involve unlawful interference with the employees' rights under section 7 of the Act to organize and bargain collectively. 29 U.S.C. § 157 (2001).

23. See St. Agnes Med. Ctr. v. NLRB, 871 F.2d 137, 146 (D.C. Cir. 1989) ("Employer conduct that does not rise to the level of an unfair labor practice may upset... 'laboratory conditions.'") (citations omitted); NLRB v. Tenn. Packers, Inc. Frosty Morn Div., 379 F.2d 172, 181 (6th Cir. 1967) ("It is not necessary that conduct which interferes with the freedom of choice in an election actually constitute an unfair labor practice."); NLRB v. Clearfield Cheese Co., 322 F.2d 89, 92 (3d Cir. 1963) ("[I]n the appraisal by the Board of the bases for refusing to certify an election deemed contaminated, it is not required to rely on conduct which would qualify as an unfair labor practice.....") (footnote and citation omitted).

24. NVF Co., Hartwell Div., 210 N.L.R.B. 663, 664 (1974). See also Nabors Alaska Drilling Co., 325 N.L.R.B. 574, 585 (1998) ("Critical period conduct which creates an atmosphere rendering improbable a free choice warrants invalidating an election. Such conduct need not rise to the level of an unfair labor practice.") (footnote and citation omitted), enforced in part and enforcement denied in part, 190 F.3d 1008, 1016 (9th Cir. 1999); Jeffrey Mfg. Div., 248 N.L.R.B. 33, 62 (1980) (observing that "the degree of proof necessary to sustain election objections is less than that to establish unfair labor practices").

25. See Action Mining, Inc., 318 N.L.R.B. 652, 654 (1995). But cf. NLRB v. Hale Mfg. Co., 602 F.2d 244, 249 (2d Cir. 1979) (discussing a situation in which "the only way to assure 'laboratory conditions' [were] restored [was] to hold a new election").

26. There appears to have been no significant prior academic consideration of this issue. See generally Craig Becker, Democracy in the Workplace: Union Representation Elections and Federal Labor Law, 77 MINN. L. REV. 495, 497 (1993) ("Despite the election's centrality to contemporary labor law, it has hardly been a focal point of legal scholarship.").
specific focus on whether it must fully remedy its unlawful conduct under the rigid standards set forth in the Board’s *Passavant* line of cases.

The article begins with a summary of the NLRA’s representation election process. It then considers the impact of employer unfair labor practices on the validity of an NLRA election. After discussing the employer’s right to remedy its unfair labor practices under *Passavant*, the article explores that case’s impact on the employer’s ability to restore the laboratory conditions necessary for a valid election. The article ultimately concludes that while the *Passavant* repudiation requirements are relevant in determining whether an employer’s unfair labor practices invalidated an election, compliance with *Passavant* is not essential to a finding that laboratory conditions have been restored.

II. THE NLRA ELECTION PROCESS

The determination of whether a particular union represents a majority of the employees in a bargaining unit typically begins when the union or one of the employees files a certification petition with the Board. When

27. *Passavant Mem’l Area Hosp.*, 237 N.L.R.B. 138 (1978). While *Passavant* is now considered the seminal Board repudiation case (*see infra* notes 83-97 and accompanying text) the Board there simply “rearticulated... the standards which a party must follow to effectively purge itself of unlawful conduct.” *Groceries and Food Prods.*, 324 N.L.R.B. 1193, 1199 (1997). *See also infra* note 191.


29. *See infra* notes 35-65 and accompanying text.

30. *See infra* notes 66-82 and accompanying text.

31. *See infra* notes 83-97 and accompanying text.

32. *See infra* notes 98-345 and accompanying text.

33. *See infra* notes 173-74 and accompanying text.

34. *See infra* notes 346-59 and accompanying text.

35. The term “bargaining unit” has been defined as “a grouping of two or more employees aggregated for the assertion of organizational rights or for collective bargaining.” *Salary Policy Employee Panel v. Tenn. Valley Auth.*, 149 F.3d 485, 492 (6th Cir. 1998) (quoting 1 *THE DEVELOPING LABOR LAW*, supra note 18, at 448-49). *See also* Vilda Samuel Laurin III, Note, *The Vote and Impound Procedure: Not Always a Guardian of Employee Free Choice*, 62 Ind. L.J. 1127, 1128 n.10 (1987) (“A bargaining unit is a group of employees who may properly be grouped for the purposes of voting in an NLRB election and for collective bargaining.”) One court has stated: “The touchstone of an appropriate bargaining unit is the finding that all of its members have a common interest in the terms and conditions of employment, to warrant their inclusion in a single unit to choose a bargaining agent.” *Uyeda v. Brooks*, 365 F.2d 326, 329 (6th Cir. 1966) (citing NLRB v. Ideal Laundry & Dry Cleaning Co., 330 F.2d 712 (10th Cir. 1964)).

36. 29 C.F.R. § 101.17 (2001); *see also* Action Mining Co., 318 N.L.R.B. 652, 660.
the petition is filed by a union claiming to be the employees' exclusive bargaining representative, it must be accompanied by appropriate "evidence of representation." This usually takes the form of authorization cards signed by at least thirty percent of the employees in the bargaining unit and designating the union as their representative.

Once a certification petition has been filed, it is investigated by a Board agent to determine whether there exists a bona fide question con-

(1995) (noting that the "usual course of events" is for the union to "file a petition with the Board"). Alternatively, the petition could be filed by the employer after a union has presented it with a claim to be the employees' exclusive bargaining representative. 29 C.F.R. § 101.17.

37. It is not unusual for more than one union to claim to be the exclusive representative of the employees in a bargaining unit. See, e.g., 29 C.F.R. § 102.69(a) (2001) (discussing the situation in which "two or more labor organizations are included as choices in an election"); Burke Oldsmobile, Inc., 128 N.L.R.B. 79, 85 (1960) (describing an employer "faced with conflicting claims of rival unions to represent its employees for purposes of collective bargaining"). In that event, the employer must "maintain a position of strict neutrality," and "refrain from any action which tends to give either an advantage over its rival." NLRB v. Indianapolis Newspapers, Inc., 210 F.2d 501, 503 (7th Cir. 1954).

38. 29 C.F.R. § 101.17. See also MGM Grand Hotel Inc., 162 L.R.R.M. (BNA) 1202, 1205 n.5 (1999) (Brame, J., dissenting) (observing that the Board will not conduct a secret ballot election unless a union's petition is accompanied by evidence of representation). The Board has stated that "[t]he purpose of requiring [this] preliminary showing of interest in a representation proceeding is to enable the Board to determine whether the conduct of an election serves a useful purpose under the [Act]." Potomac Elec. Power Co., 111 N.L.R.B. 553, 556 (1955) (citation omitted).

39. See Motion Picture & Videotape Editors Guild, 311 N.L.R.B. 801, 806 (1993) ("The evidence submitted by labor organizations in support of the ... showing of interest is usually in the form of signed and dated authorization cards . . ."); Passaic Daily News, 222 N.L.R.B. 1162, 1166 n.13 (1976) (noting that a union's showing of interest is "usually submitted in the form of signed authorization cards"); JEFFREY A. NORRIS & MICHAEL J. SHERSHIN, JR., HOW TO TAKE A CASE BEFORE THE NLRB 100 (6th ed. 1992) ("Authorization cards on which employees apply for membership in the labor organization and/or authorize the union to represent them are most frequently submitted as evidence of interest.").

40. 29 C.F.R. §§ 101.17, 101.18(a) (2001). See also NLRB v. Metro-Track Body, Inc., 613 F.2d 746, 749 (9th Cir. 1979) ("As a rule of thumb, the NLRB normally investigates only those petitions which indicate that the union is supported by at least 30 percent of the company's employees."). But see S.H. Kress & Co., 137 N.L.R.B. 1244, 1248 (1962) ("The Board's authority to conduct [an] investigation of . . . the petition is not dependent upon a petitioner's showing of interest of any specific percentage . . .").

41. The Board's rules also provide for the filing of "decertification petitions," which are intended to test the question of whether a presently certified or recognized agent is still the exclusive representative of the employees in the bargaining unit. 29 C.F.R. § 101.17 (2001). Although the procedures involved in commencing the decertification process differ from those involved in the certification process, see id., the issues addressed in this article concerning the restoration of the laboratory conditions necessary for a valid representation election are equally applicable in both situations. 29 U.S.C. § 159(e)(2) (2001) ("In determining whether or not a question of representation . . . exists, the same regulations and rules of decision apply irrespective of the identity of the persons filing the petition or the kind of relief sought.").
cerning representation within the meaning of the Act." If this investigation reveals that there is reasonable cause to believe that a question of representation exists, and that an election would reflect the free choice of the employees in the bargaining unit, the Board agent will initially encourage the parties to consent to an election in order to avoid the expense and inconvenience of a Board hearing.

If the parties do not consent to an election to determine whether a particular union represents a majority of the employees in a bargaining

42. 29 C.F.R. § 101.18(a). See also NLRB v. Lovejoy Indus., 904 F.2d 397, 400 (7th Cir. 1990) ("Members of the Board must delegate investigation and fact-finding tasks to subordinates, and with delegated power [sic] come standards of action."); S.H. Kress, 137 N.L.R.B. at 1248 (discussing "the necessary investigation of the question concerning representation raised by the petition").

43. A "question of representation" describes the circumstances which must exist before the Board is empowered to direct an election in [the] appropriate [bargaining] unit." United States Postal Serv., 256 N.L.R.B. 502, 503 (1981); see also Maxwell Co. v. NLRB, 414 F.2d 477, 489 (6th Cir. 1969) (McAllister, J., dissenting) ("If such a question does not exist, the only procedure that seems reasonable to follow is to dismiss the Union's petition . . . .").


45. The NLRA provides for "the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board." 29 U.S.C. § 159(c)(4) (2001); see also NLRB v. Chelsea Clock Co., 411 F.2d 189, 191 (1st Cir. 1969) (noting that consent elections "are expressly authorized by § 9(c)(4) of the . . . Act").

46. See Chelsea Clock Co., 411 F.2d at 191-92 (observing that consent elections "afford considerable savings of time and expense," and thus are "to be encouraged"); NORRIS & SHERSHIN, supra note 39, at 118 ("If . . . it appears that the petition is valid, the Board agent will encourage the parties to consent to an election in order to avoid the time and expense of a formal hearing."). As noted in one Board decision:

[T]he parties [may] voluntarily forego the hearing by entering into an agreement controlling all aspects of the election. . . . This voluntary device has the . . . advantage of freeing the Board from an overwhelming burden of cases by avoiding, to a large extent, the need for Board review. Thus, we must encourage voluntary stipulations to accelerate the processes of justice and effectuate the purposes of the Act.


47. The Board has defined the term "party" to include:

[A]ny person named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, [and] any person named as respondent, as employer, or as party to a contract in any proceeding under the act.

29 C.F.R. § 102.8 (1999). However, not every such party may have the ability to withhold consent to the election. See id. ("[N]othing herein shall be construed to prevent the Board . . . from limiting any party to participate in the proceedings to the extent of his interest only.").
unit, the Board is required to hold a hearing and, if it finds that a question of representation does exist, direct that an election be held. Regardless of whether the election proceeds with the parties' consent or at the Board's direction, it is conducted by secret ballot and under the direct supervision of Board agents.

Once the election has been held, a union claiming that the employer's pre-election conduct interfered with laboratory conditions can file with the Board one or more "objections to conduct affecting the results

48. 29 U.S.C. § 159(c)(1) (2001); Angelica Healthcare Servs. Group, Inc., 315 N.L.R.B. 1320, 1320-21 (1995). See also Chelsea Clock Co., 411 F.2d at 192 ("Whereas in consent elections the parties stipulate [to] such issues as the proper unit, voter eligibility, etc., in a Board-conducted election the Board is required to hold a hearing on these questions."); 1 THE DEVELOPING LABOR LAW, supra note 18, at 415 ("In the absence of . . . [a] consent election agreement, the [Board's] regional director will proceed to a hearing.").

49. See Allis-Chalmers Mfg. Co., 70 N.L.R.B. 348, 361 (1946) ("Congress provided . . . for a hearing for the purpose of adding evidence on questions of representation."); NORRIS & SHERSHIN, supra note 39, at 144 ("The purpose of the representation hearing is to gather factual information necessary for . . . the Board to rule upon a question concerning representation.").

50. 29 U.S.C. § 159(c)(1); NLRB v. Metro-Truck Body, Inc., 613 F.2d 746, 750 (9th Cir. 1979); Angelica Healthcare Servs. Group, 315 N.L.R.B. at 1320-21; see also New Berlin Trading Co. v. NLRB, 946 F.2d 527, 532 (7th Cir. 1991) ("[T]he Board has no authority to direct an election where no question of representation exists.").

51. Grant's Home Furnishings, Inc., 229 N.L.R.B. 1305, 1305 (1977) ("[T]he Board's rules, regulations, and pertinent decisional law are the same for stipulated elections as for Board-directed elections."); Jasper Pool Car Serv., Inc., 175 N.L.R.B. 1025, 1032 (1969) ("[I]t is clear that the Board intended consent elections to be governed by the same rules as elections conducted after a hearing.").

52. 29 U.S.C. § 159(c)(1); 29 C.F.R. § 102.69(a) (2001). The Board has stated: "The secret ballot is expressly required by the Act. The Board is under a duty to preserve it and it is a matter of public concern, rather than a personal privilege subject to waiver by the individual voter." J. Brenner & Sons, Inc., 154 N.L.R.B. 656, 659 n.4 (1965); see also Magic Pan, Inc. v. NLRB, 627 F.2d 105, 109 (7th Cir. 1980) ("[T]he Board's requirement of complete secrecy of the ballot cannot be waived.").

53. 29 C.F.R. § 102.69(a). See also NLRB v. S. Health Corp., 514 F.2d 1121, 1123 (7th Cir. 1975) ("[T]he Board is entrusted with the responsibility of conducting elections and of supervising the conduct and actions of the parties therein concerned to insure a free, unfettered exercise of self-determination."); NORRIS & SHERSHIN, supra note 39, at 218 ("The actual voting is always conducted and supervised by NLRB agents.").

54. Generally speaking, the timing of a representation election "is a matter for the Board to decide." Intalco Aluminum Corp., 174 N.L.R.B. 975, 976 (1969) (Fanning, J., dissenting). It is also the Board's practice to conduct such elections "as expeditiously as possible." City Mkt., 273 N.L.R.B. 469, 470 (1984). Nevertheless, "Board elections are invariably conducted with some advance notice, 72 hours at the very least." Taft Broad., 201 N.L.R.B. 801, 811 (1973).

55. See, e.g., Sewell Mfg. Co., 138 N.L.R.B. 66, 72 (discussing an election in which "the Employer's propaganda . . . exceeded permissible limits and 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"), supplemented, 140 N.L.R.B. 220 (1962).
of the election,"\textsuperscript{56} If, after an investigation,\textsuperscript{57} the Board concludes that the union's objections lack merit,\textsuperscript{58} the election results will stand\textsuperscript{59} and, depending on the vote tally,\textsuperscript{60} the union either will or will not be certified as the employees' exclusive bargaining representative.\textsuperscript{61}

\textsuperscript{56} Thomas Prods. Co., 169 N.L.R.B. 706, 706 n.1 (1968) (citing 29 C.F.R. § 102.69(a)). \textit{See also} Hobbs v. Hawkins, 968 F.2d 471, 478 (5th Cir. 1992) (stating that “a party to the election . . . is entitled to lodge an objection with the Board claiming that the election did not represent the free choice of the employees”); Grant's Home Furnishings, 229 N.L.R.B. at 1305-06 (observing that “complaints concerning an election must . . . be raised by properly filed objections at the postelection stage of the proceeding”); \textit{see, e.g.}, Ridgely Mfg. Co., 198 N.L.R.B. 860, 860 (1972) (discussing a union that “had filed . . . objections to conduct affecting the results of the election, alleg[ing], \textit{inter alia}, that [certain] employees . . . were terminated and other persons were hired just before the election, destroying the laboratory conditions necessary for a fair Board election”).

\textsuperscript{57} \textit{See} 29 C.F.R. § 102.69(c)(1)(2001). This investigation may or may not include a formal hearing on the union's objections. \textit{See} NLRB v. Golden Age Beverage Co., 415 F.2d 26, 33 (5th Cir. 1969) (“It is well established that a hearing is not required in every case to determine the validity of objections to a Board-conducted election . . . .”) (citing NLRB v. Smith Indus., Inc., 403 F.2d 889, 894 (5th Cir. 1968)); NLRB v. Chelsea Clock Co., 411 F.2d 189, 192 (1st Cir. 1969) (“For while the [Board’s] Regional Director may hold a hearing on objections to an election, in most cases he need not, and indeed does not.”); Cadillac Steel Prods. Corp., 149 N.L.R.B. 1045, 1048 (1964) (“There is no statutory authority for any claim that a party is entitled, as a matter of right, to a postelection hearing.”).

\textsuperscript{58} In this situation, the union would have the burden to prove that there had been prejudice to the fairness of the election. \textit{See} NLRB v. Banta Shoe Co., 377 F.2d 821, 826 (4th Cir. 1967). Moreover, consider the following:

\begin{quote}
This is a heavy burden; it is not met by proof of mere misrepresentations or physical threats. Rather, specific evidence is required, showing not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.
\end{quote}

\textit{Golden Age Beverage Co.}, 415 F.2d at 30.

\textsuperscript{59} In Ralph Printing & Lithography Co., 158 N.L.R.B. 1353, 1354 n.3 (1966), the Board held:

\begin{quote}
An election under Board auspices to determine a majority bargaining representative does not consist solely of the physical balloting of the employees in the appropriate unit. Necessarily, the vote of the employees and the validity of the election itself must await the Board's post election investigation of objections properly filed with respect to the conduct of the election.
\end{quote}

\textsuperscript{60} Section 9(a) of the NLRA states that collective bargaining representatives are to be selected by “the majority of the employees in a unit.” 29 U.S.C. § 159(a)(2001). The Board interprets this language to mean a majority of those employees voting in the election. \textit{See} Lemco Constr., 283 N.L.R.B. 459, 459 (1987). In the event of a tie, the union has failed to obtain a majority of the votes cast in the election, and thus will not be certified as the employees' bargaining representative. \textit{Cadillac Steel Prods.}, 149 N.L.R.B. at 1049.

\textsuperscript{61} \textit{See} United Refrigerated Servs., 325 N.L.R.B. 258, 260 (1998). Certification of the election results precludes the holding of any additional elections during the ensuing twelve month period addressing representation of the employees in the bargaining unit at issue. 29 U.S.C. § 159(c)(3), (e)(2) (2001); \textit{see also} St. Agnes Med. Ctr. v. NLRB, 871 F.2d 137 (D.C. Cir. 1989) (“In the first year following its certification by the Board as a collective
If, on the other hand, the Board concludes that the employer’s conduct interfered with the employees’ right to express their free choice (in other words, that laboratory conditions did not exist), it will set the election aside and, at least ordinarily, direct that a new election be held.

III. THE IMPACT OF EMPLOYER UNFAIR LABOR PRACTICES ON REPRESENTATION ELECTIONS

Employer actions that interfere with employee rights under the NLRA are known as “unfair labor practices,” and may give rise to independent statutory remedies through Board unfair labor practice proceedings.

bargaining representative of employees, a union enjoys an irrebuttable presumption of majority support.

62. See NLRB v. Hale Mfg. Co., 602 F.2d 244, 249 n.11 (2d Cir. 1979) (“For a union certification to be valid, laboratory conditions necessary for the conduct of a free and fair election must be maintained”) (citing Gen. Elec. Wiring Devices, Inc., 182 N.L.R.B. 876, 878 (1970)).

63. See United Refrigerated Servs., 325 N.L.R.B. at 260 (“If the Board determines that the conduct of a party has interfered with the right of employees to register their free choice in the election, then the results are deemed not to reflect the uninhibited desires of the employees, [and] the election is set aside . . . ”).

64. If the employer’s unfair labor practices were sufficiently serious that even a second election could not be conducted under laboratory conditions, the Board might order the employer to bargain directly with the union. NLRB v. Gissel Packing Co., 395 U.S. 575, 613-14 (1969). However, the Board’s authority to issue a bargaining order when the union’s representative status has not been established through a valid representation election is the subject of spirited debate. See Nabors Alaska Drilling Co., 325 N.L.R.B 574, 574-77 (1998) (Gould, W., Chairman, dissenting in part), enforced in part and enforcement denied in part, 190 F.3d 1008 (9th Cir. 1999). For an academic discussion of this potential remedy, see David S. Shillman, Note, Nonmajority Bargaining Orders: The Only Effective Remedy for Pervasive Employer Unfair Labor Practices During Union Organizing Campaigns, 20 U. Mich. J.L. Reform 617 (1987).

65. See Brown & Root U.S.A., Inc., 308 N.L.R.B. 1206, 1215 n.5 (1992) (noting that the Board’s usual policy is to direct that a new election be held when unfair labor practices served to interfere with the exercise of a free and untrammeled choice in an election); 1 THE DEVELOPING LABOR LAW, supra note 18, at 374 (“Typically, when the Board sustains a party’s objections to an election it will . . . direct a rerun [election].”).


67. Section 10(c) of the Act authorizes the Board to take affirmative remedial action in response to an employer’s unfair labor practices. 29 U.S.C. § 160(c) (2001). See also NLRB v. Aluminum Casting & Eng’g Co., 230 F.3d 286, 295 (7th Cir. 2000) (discussing section 10(c)). Although the selection of remedies to enforce the labor laws is a matter within the special competence of the Board, see Rapid Mfg. Co. v. NLRB, 612 F.2d 144, 145-46 (3d Cir. 1979), the Board’s chosen remedy should as nearly as possible restore the parties to the status quo that existed before the unfair labor practices occurred, and thereby eliminate the imbalance created by the employer’s violations of the Act. See Decaturville Sportswear Co. v. NLRB, 406 F.2d 886, 889 (6th Cir. 1969). See also Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900 (1984) (stating that the remedy must be tailored to the unfair labor practice it is intended to redress).

However, that is not the only potential impact of an employer’s unfair labor practice. In *Dal-Tex Optical Co.*, the Board held that an employer’s violation of section 8(a)(1) of the Act during the critical pre-election period was also "*a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election." Because section 8(a)(1) is the “blanket” NLRA provision shielding employees from an employer’s unlawful conduct, most employer actions that constitute unfair labor practices because they violate more particularized provisions of the Act also violate section 8(a)(1) "derivatively." Thus, an employer’s commission of virtually any unfair labor practice during the pre-election period is synonymous with the Section 8(a)(1) violation that was generally deemed to constitute per se interference with the

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69. See VJNH, Inc., 328 N.L.R.B. 87, 103 (1999) (“In addition to the normal Board remedies for unfair labor practices, . . . the election [may] be set aside and a new election . . . held.”); Teamsters Local 703 (Kencott Bros.), 284 N.L.R.B. 1125, 1128 (1987) (Dotson, D., Chairman, dissenting) ("[W]e have used the broad discretion granted us under Section 10 of the Act to fashion special remedies as necessary to correct the effects of unfair labor practices, including those occurring in the context of election proceedings.").

70. 137 N.L.R.B. 1782 (1962).


72. *Dal-Tex Optical*, 137 N.L.R.B. at 1786. See also Mississippi Valley Structural Steel Co., 196 N.L.R.B. 1129, 1132 n.2 (1972) (indicating that *Dal-Tex Optical* “could be read as meaning that any [section] 8(a)(1) conduct, regardless of its lack of impact on the results, requires setting the election aside”, but rejecting that conclusion in this case).


74. E.g., 29 U.S.C. §§ 158(a)(2)-(5) (2001). See also NLRB v. S. Cent. Bell Tel. Co., 688 F.2d 345, 354 (5th Cir. 1982) (“Section[s] 8(a)(2)-(5) was [sic] intended by Congress to be a nonexhaustive list of four specific types of employer behavior [also] barred by section 8(a)(1).”); Fun Striders, Inc. v. NLRB, 686 F.2d 659, 661 (9th Cir. 1981) (observing that “[S]ections 8(a)(2)-(5) . . . establish more specific categories of employer unfair labor practices”); cf. NLRB v. Newark Morning Ledger Co., 120 F.2d 262, 265 (3d Cir. 1941) (indicating that “sections 8(a)(2)-(5) all relate to particular species of the generic unfair practice . . . defined in section 8(a)(1) and are specifically mentioned merely because of their prevalence”).

75. *Microimage Display Div.*, 924 F.2d at 250; *Fun Striders*, 686 F.2d at 661; see also *South Cent. Bell Tel.*, 688 F.2d at 354 (observing that “a violation of any of section[s] 8(a)(2)-(5) also constitutes a violation of section 8(a)(1)’’); Allen v. NLRB, 561 F.2d 976, 978 n.2 (D.C. Cir. 1977) (“The Board has consistently observed that violations of any of the other subdivisions of § 8(a) are also violations of § 8(a)(1).”) (citations omitted).

76. See, e.g., NLRB v. Vemco, Inc., 989 F.2d 1468, 1476 (6th Cir. 1993) (concluding that “a breach of section 8(a)(3) automatically violates section 8(a)(1)’’); NLRB v. Swedish Hosp. Med. Ctr., 619 F.2d 33, 35 (9th Cir. 1980) (declaring that “[a]ny violation of Section 8(a)(3) or 8(a)(5) necessarily includes a derivative violation of Section 8(a)(1)’’); Ind. & Mich. Elec. Co. v. NLRB, 599 F.2d 227, 229 n.2 (7th Cir. 1979) (stating that “[a] violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1) when . . . the employer’s acts
employees’ freedom of choice under *Dal-Tex Optical*. As a result, the Board’s normal practice was to set aside any election in which the employer committed an unfair labor practice during the critical pre-election period.

However, the Board no longer adheres to the categorical view expressed in *Dal-Tex Optical*. It instead now holds that an employer’s commission of an unfair labor practice during the critical pre-election period will not invalidate an election if the impact of the employer’s conduct on the outcome of the election was “de minimis.” This revised and slightly more forgiving standard suggests that the laboratory conditions necessary for a valid election can sometimes be restored if an unfair labor practice occurring during the pre-election period is promptly remedied.

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77. See NLRB v. Harbor Crest Elec., 307 N.L.R.B. 581, 588 (1992) (noting that “Section 8(a)(1) and 8(a)(3) unfair labor practices are treated as objectionable conduct which, a fortiori, interferes with the exercise of a free and untrammeled choice in an NLRB election sufficient to warrant setting aside an election outcome”) (emphasis added); Jennie-O Foods, Inc., 301 N.L.R.B. 305, 340 (1991) (stating that “unfair labor practices...a fortiori interfere with the conduct of an election” under *Dal-Tex Optical*) (emphasis added).

78. See Caron Int’l, Inc., 246 N.L.R.B. 1120, 1121 (1979) (Jenkins, H. & Truesdale, J., dissenting in part) (quoting Dal-Tex, 137 N.L.R.B. at 1786); Super Thrift Mkts., 233 N.L.R.B. 409, 409 (1977); see also Norris & Shershin, supra note 39, at 240 (discussing the Board’s doctrine that conduct constituting an unfair labor practice is sufficient grounds for setting aside an election).

79. See Bell Halter, Inc., 276 N.L.R.B. 1208, 1223 (1985) (noting that “[i]n more recent years, the Board has refused to adopt a per se approach in applying the principles of *Dal-Tex Optical*”); McIndustries, Inc., 224 N.L.R.B. 1298, 1304 n.3 (1976) (stating that “the Dal-Tex Optical test should not be applied mechanically”); Miss. Valley Structural Steel Co., 196 N.L.R.B. 1129, 1132 n.2 (1972) (noting that, “the Board, although citing Dal-Tex with approval, [has] limited its language in subsequent cases”); 1 THE DEVELOPING LABOR LAW, supra note 18, at 86 (“The Board [has] qualified its Dal-Tex approach; it is no longer a per se requirement that an election be automatically set aside whenever section 8(a)(1) conduct has occurred during the pre-election period.”)

80. See Detroit Edison Co., 310 N.L.R.B. 564, 566 n.7 (1993); Metz Metallurgical Corp., 270 N.L.R.B. 889, 889 (1984); see, e.g., Caron Int’l, 246 N.L.R.B. at 1120 (finding an employer’s unfair labor practices to be too minimal to have interfered with the results of the election); Miss. Valley Structural Steel Co., 196 N.L.R.B. at 1132 (finding that the employer’s unfair labor practices were insubstantial and so limited in their impact as to have had no material effect on the results of the election).

81. One Board administrative law judge has interpreted the relaxed *Dal-Tex Optical* standard to mean that a section 8(a)(1) violation is now “normally held to be conduct which interferes with the exercise of a free and untrammeled choice in an election.” McIndustries, Inc., 224 N.L.R.B. at 1304 (emphasis added). But see NLRB v. Lovejoy Indus., 904 F.2d 397, 401 (7th Cir. 1990) (asserting that “[p]revailing doctrine has it that employees are hardy, so that the results of elections usually stand despite imperfections that would have led to re-runs...in earlier years”).

82. In NLRB v. Southwire Co., 801 F.2d 1252, 1259 (11th Cir. 1986), for example, the court concluded that unfair labor practices that were promptly repudiated by the employer...
IV. THE EMPLOYER'S RIGHT TO CURE ITS UNFAIR LABOR PRACTICES

Passavant Memorial Area Hospital\textsuperscript{83} is the seminal Board decision addressing an employer's right to remedy its unfair labor practices by voluntarily repudiating them without Board intervention.\textsuperscript{84} The case involved an employer's attempt to repudiate its previous unlawful threat to discharge economic strikers.\textsuperscript{85} While concluding that the attempted repudiation did not eliminate the need for a Board remedy,\textsuperscript{86} the Board indicated that, under certain circumstances, employers can avoid statutory liability by voluntarily remedying their unfair labor practices.\textsuperscript{87}

In order to claim the benefit of Passavant's "repudiation doctrine,"\textsuperscript{88} the employer's disavowal of its unfair labor practice must not only be timely,\textsuperscript{89} but "unambiguous, specific in nature to the [unlawful] conduct, had resulted in de minimis interference with its employees' organizational rights; see also Nabors Alaska Drilling, Inc., 325 N.L.R.B. 574, 585 (1998) (observing that the de minimis doctrine applies to unlawful conduct that is largely rendered meaningless by subsequent conduct), enforced in part and enforcement denied in part, 190 F.3d 1008 (9th Cir. 1999); cf. McDonnell Douglas Corp. v. NLRB, 472 F.2d 539, 542 (8th Cir. 1973) (discussing an employer's contention that its unfair labor practice was an isolated, remedied, and, therefore, de minimis occurrence); Benteler Indus., Inc., 323 N.L.R.B. 712, 712 n.1 (1997) (concluding that an employer did not remedy a prior violation of Section 8(a)(1) or render it de minimis).

84. See Action Mining, Inc., 318 N.L.R.B. 652, 654 (1995) (declaring that "[t]he Board's standard for an appropriate repudiation of unfair labor practices is set forth in Passavant"); Agri-Int'l Inc., 271 N.L.R.B. 925, 937 (1984) ("In Passavant the Board set forth the standards to be utilized in considering whether an employer has effectively repudiated its unlawful conduct so as to avoid the finding of a violation of the Act based on such conduct.").
86. Passavant, 237 N.L.R.B. at 139. Among other things, the Board concluded that the disavowal was neither sufficiently clear nor sufficiently specific to obviate the need for further remedial action. Id.
87. Id. at 138; see also NLRB v. St. Vincent's Hosp., 729 F.2d 730, 732 (11th Cir. 1984) (citing Passavant for the proposition that "under some circumstances an employer may repudiate its unlawful conduct and thereby relieve itself from liability").
88. St. Vincent's Hosp., 729 F.2d at 732; see also Mantrose-Haeuser Co., 306 N.L.R.B. 377, 380 (1992) (discussing "the defense of 'repudiation' [under] Passavant"). But see Kawasaki Motors Corp., 257 N.L.R.B. 502, 519 (1981) (expressing "doubts that the Board's pronouncements on the subject may be said to have ever risen to the level of a 'doctrine'").
89. See Foster Elec., 308 N.L.R.B. 1253, 1260 (1992); Int'l Automated Machs., 285 N.L.R.B. 1122, 1133 (1987). Compliance with Passavant's timeliness requirement is often critical. See, e.g., MPG Transp., Ltd., 315 N.L.R.B. 489, 489 n.1 (1994) (finding that an employer's attempted repudiation was untimely where it occurred "approximately 1 month" after the unfair labor practice was committed), enforced, 91 F.3d 144 (6th Cir. 1996); Phillips Indus. Components, 216 N.L.R.B. 885, 885 n.2 (1975) (finding that a delay of "about 2 weeks" was "too great").
90. Foster Elec., 308 N.L.R.B. at 1260 (discussing Passavant).
free from other proscribed conduct, adequately published to the employees involved, accompanied by assurances that the employer will not interfere with the employees’ Section 7 rights in the future and not followed by [any] additional illegal conduct.\textsuperscript{96} If these requirements are met,\textsuperscript{91} the Board presumes that the employer’s unlawful conduct has been adequately remedied,\textsuperscript{92} and there is no need for further Board intervention.\textsuperscript{93}

The \textit{Passavant} standards are stringent,\textsuperscript{94} and difficult for employers to meet.\textsuperscript{95} If they must be satisfied in order to restore the laboratory conditions necessary to conduct a valid representation election,\textsuperscript{96} employers who have committed unfair labor practices during the critical pre-election period will rarely be able to avoid a Board finding that the election was invalid.\textsuperscript{97}

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\item[91.] The Board has indicated that “[t]he criteria of \textit{Passavant} are stated in the conjunctive; all must be satisfied before an employer may escape liability for its unfair labor practices.” \textit{Raysel-IDE, Inc.}, 284 N.L.R.B. 879, 886 (1987).
\item[92.] \textit{See Action Mining, Inc.}, 318 N.L.R.B. 652, 654 (1995) (“Under Board law and policy... the [employer’s] predisavowal unfair labor practices are considered... adequately remedied...”).
\item[93.] \textit{See Gen. Indus. Employees Union, Local 42 v. NLRB}, 951 F.2d 1308, 1312 (D.C. Cir. 1991) (indicating that by satisfying \textit{Passavant}, an employer may have “cured its unfair labor practices so entirely that no further Board proceedings are appropriate”) (internal quotation marks omitted).
\item[95.] \textit{See, e.g.}, \textit{Grief Bros. Corp.}, No. 34-CA-8726, 2000 NLRB LEXIS 128, at *78-79 (Feb. 29, 2000) (declining to find that the employer had “effectively repudiated [its] unlawful conduct” under \textit{Passavant}, even though it had “satisfied virtually all of the requirements for an effective repudiation”). In some cases, little analysis has been needed to establish that an employer’s attempt to rectify its misconduct failed to satisfy \textit{Passavant}. \textit{See, e.g.}, \textit{Value City Dept Stores, No. 8-CA-21914}, 1991 NLRB LEXIS 1147, at *243 (Sept. 13, 1991); \textit{Mohawk Liqueur}, 300 N.L.R.B. at 1086.
\item[96.] This issue was not addressed in \textit{Passavant} itself. Even before \textit{Passavant} was decided, however, one Board member asserted that “[o]nly a complete and timely disavowal by the Employer... can restore[] to [employees] the strict laboratory conditions... so vigorously insisted upon by this Board in representation elections.” \textit{Stewart-Warner Corp.}, 102 N.L.R.B. 1153, 1160 (1953) (Murdock, A., dissenting).
\item[97.] \textit{See generally Tencor, Inc. v. NLRB}, No. 96-60130, 1997 U.S. App. LEXIS 12694, at *32 n.16 (5th Cir. Apr. 8, 1997) (Garza, J., dissenting) (“The Board almost invariably overturns an election where it finds unfair labor practices were committed during the pre-election period.”) (citing \textit{Dal-Tex Optical}, 137 N.L.R.B. 1782 (1962)); \textit{Caron Int’l, Inc.}, 246 N.L.R.B. 1120, 1121 (1979) (Jenkins, H. & Truesdale, J., dissenting in part) (“It is well settled that our normal practice is to set aside an election whenever an unfair labor practice occurs during the critical [pre-election] period...”) (emphasis added).
\item[98.] \textit{Action Mining, Inc.}, 318 N.L.R.B. 652, 654 (1995) (“A \textit{Passavant} disavowal adequate to remedy unfair labor practices within the critical period before a Board election is
V. APPLYING PASSAVANT IN THE ELECTION CONTEXT

A. Remedial Efforts that Satisfy Passavant

1. Gaines Electric

The Board generally holds that a repudiation sufficient to remedy an unfair labor practice is also sufficient to restore the laboratory conditions necessary for a valid representation election. The first Board case to reach that result was Gaines Electric Co. The employer in Gaines was alleged to have violated the Act by issuing veiled threats to close its business because of its employees' union activities. The union claimed that because this conduct occurred during the critical pre-election period, it had invalidated the election.

The Board assumed the employer had committed an unfair labor practice, and thus focused on whether its subsequent attempt to repudiate its conduct was sufficient to restore the conditions necessary for a valid election. The attempted repudiation took the form of a statement issued by the company's president advising its employees, in pertinent part, as follows:

"It is unlawful for me to threaten to close or sell the Company because of employees' union activities. You should disregard all statements I may have made to you, which even created an im-

99. 309 N.L.R.B. at 1081.
100. Id. at 1080. For an academic discussion of this issue, see Claudia Wickham Lane, Comment, Unfair Labor Practice and Contract Aspects of an Employer's Desire to Close, Partially Close, or Relocate Bargaining Unit Work, 24 Duq. L. Rev. 285 (1985).
102. Id. at 1077-78, 1080.
103. Id. at 1081. The Board has recently stated that "a threat of plant closure" is "arguably the most serious of all the 'hallmark' violations of Section 8(a)(1) of the Act." Springs Indus., 165 L.R.R.M. (BNA) 1161, 1161 (2000); see also Pittsburgh & New England Trucking Co., 249 N.L.R.B. 833, 833 (1980) ("A threat of loss of employment, whether through plant closure, discharge, or layoff, is one of the most flagrant means by which an employer can hope to dissuade employees from supporting a union."); Rapid Mfg. Co., 239 N.L.R.B. 465, 466 (1978) ("The Board has consistently viewed outright threats of plant closure as coercion of a most serious nature when made by an employer as a penalty for unionization."); enforcement denied, 612 F.2d 144 (3d Cir. 1979) (citing Standard Knitting Mills, Inc., 172 N.L.R.B. 1122 (1968)).
104. Gaines Elec., 309 N.L.R.B. at 1081. See generally Murcel Mfg. Corp., 231 N.L.R.B. 623, 642 (1977) (indicating that a "threat about the plant closing in the event the Union came in" can be "neutralized").
pression in your mind that I was threatening you because you were engaging in union activities.

I am repudiating any express or inferred threats to discontinue business activity or impose unreasonable working conditions because I do not want any cloud to interfere with your rights and the rights of your fellow employees to vote in a fair election run by the National Labor Relations Board.

The Company assures you that it will not in any other manner interfere with the rights you and other employees have which are protected by the National Labor Relations Act.  

The Board analyzed this statement under the Passavant standards for repudiating unfair labor practices. It first noted that the repudiation was timely, coming "reasonably promptly" after the allegedly unlawful conduct, and nearly two weeks before the election. The Board concluded that because the repudiation was also "reasonably consistent" with the other Passavant requirements, it adequately remedied any unfair labor practice the employer may have committed, and also restored in a timely manner the laboratory conditions necessary for a valid election.

2. Action Mining

The Board addressed the impact of Passavant again in Action Mining Inc. Upon receiving notice that the union had filed a certification petition, the employer in Action Mining began a campaign to discourage employee support of the union. When the union subsequently lost the elec-
tion, it filed election objections\textsuperscript{113} alleging that the employer's commission of unfair labor practices during the critical pre-election period\textsuperscript{114} had invalidated the election.\textsuperscript{115} Those unfair labor practices included threats to shut down operations if the union won the election,\textsuperscript{116} interrogations of employees concerning their union sentiments,\textsuperscript{117} and statements leading employees to believe their organizational activities were under surveillance.\textsuperscript{118}

However, the employer argued that once these unfair labor practices were brought to its attention, it promptly disavowed them in a posted notice to employees.\textsuperscript{119} Among other things, the notice stated that any decision concerning continued operations would not be premised on the outcome of the election,\textsuperscript{120} that no employee would be disciplined or discharged for supporting the union,\textsuperscript{121} and that the company's supervisors had been instructed to cease interrogating\textsuperscript{122} or engaging in any surveillance of its em-

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114. Id. at 667.
115. Id. at 652.
116. Id. at 653, 661, 666; see supra note 103.
117. Action Mining, 318 N.L.R.B. at 653, 661, 666. The Board has offered the following explanation of why such interrogations may violate the Act:

\[\text{[A}\text{]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude, and profane does not alter the case.}\]


118. Action Mining, 318 N.L.R.B. at 653, 661, 666. An employer may violate section 8(a)(1) of the Act "by giving employees the impression that their union activities were under surveillance." Meat Cleaver, 200 N.L.R.B. 960, 964 (1972); see also J.P. Stevens & Co., 244 N.L.R.B. 407, 422 (1979) ("Section 7 of the Act protects employees in their right to engage in union activity free of harassing expressions by supervision to the effect that the 'eyes and ears' of management are monitoring such conduct.'"); Borg-Warner Corp., 234 N.L.R.B. 1283, 1286 (1978) (asserting that an employer's conduct in "creating an impression of surveillance of its employees' union activities. . . is plainly violative of the Act"), enforced, 608 F.2d 1344 (10th Cir. 1979).


120. Id. at 662. See generally Weather Tamer, Inc. v. NLRB, 676 F.2d 483, 488 (11th Cir. 1982) (indicating that "it is not a violation of the Act to close a plant for legitimate economic reasons").

121. Action Mining, 318 N.L.R.B. at 662. See generally Holyoke Visiting Nurses Ass'n v. NLRB, 11 F.3d 302, 307 (1st Cir. 1993) ("Employers violate sections 8(a)(1) and 3 of the Act by threatening reprisals or discriminating against employees because they engage in union or other activities protected by the Act or are suspected of doing so.")


123. Action Mining, 318 N.L.R.B. at 662; cf. Kawasaki Motors Corp., 231 N.L.R.B. 1151, 1152 (1977) (finding that a "voluntary posting by the [employer] was adequate to ex-
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ployees. The notice also expressly disavowed any prior company statements to the contrary, and assured employees that the company would not interfere with their organizational rights in the future.

The administrative law judge characterized this notice as "explicit and detailed," and indicated that if its "facial validity" was the only matter at issue, the employer had successfully disavowed its unfair labor practices. However, he found that the employer had committed additional unfair labor practices after posting the notice, including some on the very day of the election, and that its attempted disavowal was therefore ineffective under Passavant. Because the unlawful conduct he found to be unremedied under Passavant occurred during the critical period between

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125. *Action Mining*, 318 N.L.R.B. at 662. See also United Refrigerated Servs., 325 N.L.R.B. 258, 259 (1998) ("[T]he repudiation should give assurances to employees that the employer will not interfere with their Section 7 rights in the future.") (citing *Passavant*).

126. Hearings involving alleged unfair labor practices and objections to representation elections are ordinarily held before Board administrative law judges and hearing officers, respectively, and their decisions are then subject to review by the Board itself. 29 C.F.R. §§ 102.6, 102.15-16, 102.24, 102.45(a), 102.48(b), 102.69 (1999). However, "both the objection to the election and the unfair labor practice complaint [may] be consolidated for hearing before the [administrative] law judge." 1 THE DEVELOPING LABOR LAW, supra note 18, at 343 n.33 (citing Freeport Marble & Tile Co., 153 N.L.R.B. 810 (1965), enforced in part, 367 F.2d 371 (1st Cir. 1966)).

127. *Action Mining*, 318 N.L.R.B. at 666. See also Red Arrow Freight Lines, 289 N.L.R.B. at 247 (noting that, in order to be effective under *Passavant*, an employer's repudiation of its unfair labor practices must be "clear and specific in nature") (internal quotation marks omitted).

128. *Action Mining*, 318 N.L.R.B. at 666; see also id. at 653 (noting that "the judge found that the . . . notice to the employees initially fulfilled the requirements for an effective disavowal of the unfair labor practices").

129. Id. at 657, 666. There appears to have been no dispute that, after posting its disavowal notice, the employer continued communicating with employees as part of a "planned, multi-staged campaign . . . to oppose the Union." Id. at 655. Again, that conduct alone was not unlawful. See NLRB v. Hanes Hosiery Div. – Hanes Corp., 384 F.2d 188, 191 (4th Cir. 1967) (observing that "fairness in the elective process demands . . . the opportunity of contesting parties to communicate their respective positions to the electorate").


131. Id. at 653, 667. See also Grocery and Food Prods., Processors, Canners, Frozen Food Plants, Sugar Processors, Confectionary and Candy Mfrs. and Distrbs., 324 N.L.R.B. 1193, 1199 (1997) (noting that the Board in *Passavant* "insisted . . . that there be no proscribed conduct by the wrongdoer following publication").

132. The Board has stated that an employer's commission of additional unfair labor practices "essentially viat[es] its earlier repudiation of . . . unlawful conduct." Intertherm, Inc., 235 N.L.R.B. 693, 694 (1978), enforced in part and enforcement denied in part, 596 F.2d 267 (8th Cir. 1979). Consistent with that view, the administrative law judge in *Action Mining* found that the employer's purportedly unlawful post-repudiation conduct had "invalidated the disavowal notice." *Action Mining*, 318 N.L.R.B. at 653.
the filing of the petition and the election, the judge recommended that the election be set aside.\textsuperscript{134} The Board agreed that the employer’s disavowal was sufficient to repudiate the unfair labor practices it had committed prior to posting the notice, but rejected the administrative law judge’s finding that the employer’s post-repudiation conduct violated the Act.\textsuperscript{136} That conduct essentially involved the employer’s expression of opposition to the employees’ selection of the union to represent them, which the Board found to be “lawful discussions of campaign issues.”\textsuperscript{138}

Having found that the employer engaged in no further unlawful conduct after posting a notice that satisfied \textit{Passavant} in all other respects,\textsuperscript{139} the Board held that the laboratory conditions necessary for a valid election had been restored,\textsuperscript{140} citing \textit{Gaines Electric Co.}, 309 N.L.R.B. 1077 (1992). The Board in \textit{Action Mining} also cited Agri-Int’l Inc., 271 N.L.R.B. 925 (1984), which is discussed \textit{infra} in Section V.A.4.\textsuperscript{141} the Board explained that, as a matter of “Board law and policy,” “a repudiation sufficient to satisfy \textit{Passavant} “is also sufficient to restore the laboratory conditions necessary for a valid election.”\textsuperscript{142} It therefore rejected the administrative law judge’s recommendation that the election be set aside,\textsuperscript{143} and instead certified the election results.\textsuperscript{144}

3. Galen Hospital Alaska

The Board reached a similar result in \textit{Galen Hospital Alaska}.\textsuperscript{145} The employer in \textit{Galen} was alleged to have interfered with the requisite laboratory conditions by threatening to cease regularly-scheduled wage in-

\begin{itemize}
\item \textsuperscript{133} See supra note 19 and accompanying text.
\item \textsuperscript{134} \textit{Action Mining}, 318 N.L.R.B. at 667, 668, 683.
\item \textsuperscript{135} Id. at 654.
\item \textsuperscript{136} Id. at 653, 654.
\item \textsuperscript{137} Id. at 654.
\item \textsuperscript{138} Id. at 655; cf. \textit{Weather Tamer, Inc. v. NLRB}, 676 F.2d 483, 488 (11th Cir. 1982) (“The employer may speak against unions in general or against the particular union seeking representation. . . .”); \textit{NLRB v. McGahey}, 233 F.2d 406, 409 (5th Cir. 1956) (observing that an employer’s “strong conviction[] against unions . . . is not itself an unfair labor practice”).
\item \textsuperscript{139} See \textit{Webco Indus., Inc.}, 327 N.L.R.B. 172, 173 (1998) (embracing a view of the repudiation doctrine that requires “adherence to all the standards set forth in \textit{Passavant}”), enforced, 217 F.3d 1306 (10th Cir. 2000).
\item \textsuperscript{140} \textit{Action Mining}, 318 N.L.R.B. at 658.
\item \textsuperscript{141} 309 N.L.R.B. 1077 (1992). The Board in \textit{Action Mining} also cited Agri-Int’l Inc., 271 N.L.R.B. 925 (1984), which is discussed \textit{infra} in Section V.A.4.
\item \textsuperscript{142} \textit{Action Mining}, 318 N.L.R.B. at 654.
\item \textsuperscript{143} Id. at 667-68, 683.
\item \textsuperscript{144} Id. at 653.
\item \textsuperscript{145} 327 N.L.R.B. 876 (1999).
\end{itemize}
creases if the union prevailed in an impending election. The employer's alleged threats took the form of comments made by its chief executive officer during a "captive audience" meeting to the effect that, if the employees voted in favor of the union, any wage increases or other changes in benefits would remain "status quo" until a union contract was negotiated.

The Board assumed, without deciding, that these statements were unlawful. However, the Board relied upon *Passavant* and *Gaines Electric Co.* in holding that, by issuing a written clarification to its employees on the day after they were made, the employer "took adequate steps to repudiate any improper implications of the statements and, by doing so, restored the laboratory conditions necessary for a fair and valid election." In reaching this conclusion, the Board noted that dissemination of the clarification had been sufficient because the employer made a reasonable effort to provide it to all of the employees who had attended the original group meeting. The Board explained that an employer's repudiation of

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146. *Id.* at 876.

147. *Id.* For a general discussion of the implications of captive audience speeches made during union election campaigns, see Note, *NLRB Regulation of Employer's Pre-Election Captive Audience Speeches*, 65 Mich. L. Rev. 1236 (1967).

148. *Galen Hosp. Alaska*, 327 N.L.R.B. at 876 n.5; cf. Noah's Bay Area Bagels, LLC, 331 N.L.R.B. No. 17, 2000 NLRB LEXIS 305, at *72-73 (May 22, 2000) (finding "comments to employees during a captive audience speech to be a coercive threat [that] they [would] receive less favorable wages or other terms and conditions of employment if they selected the Union as their collective-bargaining representative").

149. *Galen Hosp. Alaska*, 327 N.L.R.B. at 877. The Board generally holds that "the withholding of pay raises from employees who are awaiting the holding of a Board election violates the Act if the employees otherwise would have been granted the pay raises in the normal course of the employer's business." *Progressive Supermarkets, Inc.*, 259 N.L.R.B. 512, 512 (1981). This rule has been extended to the withholding of benefits "subsequent to the election but before certification, or after the certification has issued." *Am. Telecomms. Corp.*, Electromechanical Div., 249 N.L.R.B. 1135, 1137 (1980) (footnotes omitted).


151. The clarification stated, in pertinent part:

I was discussing what would happen with annual increases if the union won the election. I need to make it clear that Alaska Regional will maintain the status quo during any period of contract negotiations if the union won [sic]. That means Alaska Regional would continue to give employees regularly scheduled wage increases as it has done in the past. Whether such increases would continue under a union contract would be the subject of negotiations.


152. *Id.*

153. *Id.* See also *Grondorf, Field, Black & Co.*, 318 N.L.R.B. 996, 996 (1995) (noting that *Passavant* requires "adequate publication of the repudiation to [the] employees involved").

154. *Galen Hosp. Alaska*, 327 N.L.R.B. at 877. The Board hearing officer concluded that the employer had not given employees sufficient notice of the repudiation of its original statements because, unlike the antiunion literature, its clarification was not "circulated . . . throughout [the] facility." *Id.*; cf. *Fashion Fair, Inc.*, 159 N.L.R.B. 1435, 1444 (1966) ("[T]o
prior coercive statements will satisfy *Passavant*’s notice requirement if it is communicated in the same manner as the original unlawful statements.\(^{155}\)

4. Agri-International and International Harvester

Despite the analysis in *Gaines Electric*\(^{156}\) and its progeny,\(^{157}\) compliance with *Passavant* may not be sufficient to restore the laboratory conditions necessary for a valid election in all cases.\(^{158}\) This conclusion is suggested by the analysis in *Agri-International*,\(^{159}\) a case in which the Board nevertheless ultimately held that an employer’s compliance with *Passavant* was sufficient to restore laboratory conditions.\(^{160}\)

In *Agri-International*, the employer committed a possible unfair labor practice\(^{161}\) when some of its supervisors began interrogating employees about their votes in an upcoming representation election.\(^{162}\) Upon learning of this potentially coercive conduct,\(^{163}\) the company’s general manager both posted and mailed to employees a disavowal notice describing the employees’ rights under the NLRA,\(^{164}\) and pledging that, in the future, they would

be effective, a neutralization effort must be adequately publicized substantially to reach all employees.”). However, in *Galen* the Board rejected this analysis, noting that the employer’s notice was adequate because the original statements “were made in a group setting—not on a facility-wide basis—and the retraction was directed to those in that group.”

\(^{155}\) *Galen Hosp. Alaska*, 327 N.L.R.B. at 877.


\(^{158}\) Even in *Gaines*, the Board indicated that it was merely finding that laboratory conditions had been restored “in the circumstances of [that] case.” *Id.* at 1081; cf. *Galen Hosp. Alaska*, 327 N.L.R.B. at 877 (holding that the employer’s repudiation had been sufficient “under [the] circumstances”).

\(^{159}\) As a general proposition, the Board approaches the question of whether laboratory conditions existed on a case-by-case basis. See Lach-Simkins Dental Labs., Inc., 186 N.L.R.B. 671, 672 (1970); see also Amalgamated Clothing & Textile Workers Union v. NLRB, 736 F.2d 1559, 1562 (D.C. Cir. 1984) (indicating that the determination of whether “laboratory conditions have sufficiently deteriorated to require a rerun election” is a “delicate, fact-based determination that can be made only after careful weighing of all of the evidence”).


\(^{161}\) *Id.* at 927.

\(^{162}\) *Id.* at 926 (describing the employer’s conduct as “unlawful”).

\(^{163}\) *Id.* at 936; see *supra* note 117.

\(^{164}\) The Board has indicated that “interrogation of employees is not illegal per se,” but instead violates the Act only if “either the words themselves or the context in which they are used . . . suggest an element of coercion or interference.” Rossmore House, 269 N.L.R.B. 1176, 1177 (1984) (quoting Midwest Stock Exch. v. NLRB, 635 F.2d 1255, 1267 (7th Cir. 1980)), *aff’d sub nom.* Hotel Employees Union, Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985).

\(^{165}\) *Agri-Int’l*, 271 N.L.R.B. at 926, 936. See also Dallas Times Herald, 315 N.L.R.B. 700, 710 (1994) (observing that “the Board has a strong interest in advising employees of
not be asked how they were going to vote in an election. The notice was also explained to employees in a series of meetings at which each of the supervisors who had been involved in the interrogations expressed their commitment to the assurances contained in the notice.

The administrative law judge concluded that the employer’s attempt to voluntarily remedy its conduct was insufficient to prevent that conduct from interfering with the employees’ free and untrammeled choice in the election, even though its disavowal of the interrogations “clearly complied with all the Passavant standards, and . . . effectively repudiated the violation inherent in the otherwise coercive questioning of employees.” The administrative law judge based this conclusion on the fact that the disavowal occurred only nine days before the election. He reasoned that this did not provide sufficient time to dispel the coercive effects of the unlawful interrogations. Id.; cf. Pilliod of Miss., Inc., 275 N.L.R.B. 799, 809 (1985) (finding that an employer’s disavowal of its conduct “on the day before the election” was “not timely”).

The Board subsequently rejected this reasoning, and held that the repudiated interrogations did not invalidate the election. The Board explained:

If, as the judge correctly concluded . . . , the [employer] effectively disseminated and communicated to its employees its strong disavowal of the interrogation and gave assurances that there would be no repetition of conduct interfering with the exercise of the employees’ [statutory] rights, it follows that in wiping the slate clean by its disavowal the [employer] restored in timely fashion the laboratory conditions which permitted the holding of a valid election.

The Board’s analysis in Agri-International confirms that an employer’s compliance with Passavant will at least ordinarily be sufficient to restore the laboratory conditions necessary for a valid representation election. However, the case also suggests that there may be circumstances
under which an unfair labor practice would invalidate an election despite having been fully remedied within the meaning of *Passavant*.173

In particular, the administrative law judge was correct in concluding that the lingering effects of an unfair labor practice174 can interfere with the employee’s free choice in the election.175 There is no reason to believe this could not be true of an unfair labor practice that the employer had completely repudiated.176 In *International Harvester*,177 for example, the Board held that an employer’s repudiation of its previous threat to withdraw benefits if its employees unionized178 had “no curative effect” on the election.179 Without specifically mentioning *Passavant*,180 the Board explained that “once [such] a threat is uttered it is very difficult at a later date to cure its coercive effects.”181

5. Kawasaki Motors Corp.

Reasoning similar to that in *International Harvester Co.*,182 also appears in *Kawasaki Motors Corp.*183 The employer in *Kawasaki* committed nu-

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173. See Servomation of Columbus, Inc., 219 N.L.R.B. 504, 505-06 (1975) (stating that where a party’s misconduct “generates an atmosphere of fear and coercion which persists to the date of the election and taints the conditions under which it is conducted,” the election will be set aside even if the misconduct itself has subsided “to the point where it was nonexistent at the time of the election”).


175. *Id.* at 939; cf. *Master Slack Corp.*, 271 N.L.R.B. 78, 84 (1984) (noting that an employer’s “serious and flagrant unfair labor practices” can have “a possible long lasting effect on the bargaining unit and . . . discourage employees from supporting the Union”).

176. See *Oster Specialty Prods.*, 315 N.L.R.B. at 75 (referring to the issue of “whether a *Passavant* repudiation was sufficient to avoid the lingering effects of objectionable conduct which could interfere with the laboratory conditions of election”).


178. *Id.* at 1162 n.3. See also *Hamilton Avnet Elecs.*, 240 N.L.R.B. 781, 789 (1979) (noting that “statements [which] threaten the loss of benefits should the employees select the Union as their collective-bargaining representative . . . are clearly violative of the Act”).

179. *Int’l Harvester*, 258 N.L.R.B. at 1162 n.3; cf. *Natco*, Inc., 302 N.L.R.B. 668, 687 (1991) (finding that an employer that had rescinded its unlawful pay cut did not “dispel the lingering effects of its coercive conduct”).

180. The hearing officer, whose report was omitted from the Board’s published decision, did discuss *Passavant*. *Int’l Harvester*, 258 N.L.R.B. at 1162.

181. *Int’l Harvester*, 258 N.L.R.B. at 1162 n.3; cf. *Louisburg Sportswear Co.*, 180 N.L.R.B. 739, 740 (1970) (finding that an employer’s unfair labor practices “were of such a pervasive character as to make it unlikely that their lingering effects could be neutralized”), enforced in part and enforcement denied in part, 462 F.2d 380 (4th Cir. 1972).

182. 258 N.L.R.B. 1162 (1982).

183. 257 N.L.R.B. 502 (1981). However, the repudiation at issue in *Kawasaki* may not actually have satisfied *Passavant*, having been “very general” in nature, and accompanied by claims that the employer was “innocent of all wrongdoing.” *Id.* at 519; cf. *Chicago Beef Co.*, 298 N.L.R.B. 1039, 1056 (1990) (finding that an employer “failed to lawfully repudiate or cure its unfair labor practice” in part because its posted notice contained a “denial
merous unfair labor practices during the critical pre-election period, most of which involved threats of adverse consequences to employees if the union prevailed in the impending election. When the union subsequently lost the election it filed objections to the conduct of the election contending that “these unfair labor practices disrupted conditions enabling a free and uncoerced choice in the election.”

Relying on *Fashion Fair, Inc.*, an earlier Board repudiation case that was cited with approval in *Passavant*, the employer in *Kawasaki* argued that “disclaimer” notices it had posted after committing the unfair labor practices, in which it apparently assured its employees of “its intentions to refrain from illegal activities in the future,” had eliminated any need for a Board remedy. However, the administrative law judge rejected this argument, concluding in accordance with the analysis in *Fashion Fair* that the “severity, breadth, and variety” of the employer’s unfair labor practices “fatally detract[ed] from the good impact its disclaimers might have had to dispel any lingering coercive effects among its employees.”

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184. *Kawasaki Motors*, 257 N.L.R.B. at 519 (noting that the employer “engaged in numerous and serious unfair labor practices”).
185. Id. at 513.
186. Id. at 505.
187. Id. at 505, 513. These technically should have been objections to “conduct affecting the results of the election,” 29 C.F.R. § 102.69(a) (1999), because it is “[t]he latter [that] involve alleged misconduct by a party during the campaign leading up to an election and frequently involve behavior that constitutes an independent violation of section 8 of the Act.” 1 THE DEVELOPING LABOR LAW, supra note 18, at 434-35. However, the error obviously was not fatal to the union’s argument. See Am. Safety Equip. Corp., 234 N.L.R.B. 501, 502 (1978) (“Were we to close our eyes to objectionable conduct merely because a party has failed to frame its objections properly . . ., we would make a mockery of our pledge to preserve employee rights to a fair election.”).
188. *Kawasaki Motors*, 257 N.L.R.B. at 519.
190. *Passavant Mem’l Area Hosp.*, 237 N.L.R.B. at 138-39 (1978). *Fashion Fair* appears to be the most significant pre-*Passavant* Board decision addressing an employer’s right to voluntarily remedy its own unfair labor practices. See, e.g., N.L.R.B. v. Intertherm, Inc. 596 F.2d 267, 277 (1979) (asserting that *Fashion Fair* established “the general procedure an employer must follow to remedy an unfair labor practice”).
191. *Kawasaki Motors*, 257 N.L.R.B. at 519. In contrast to the Board’s practice in other repudiation cases, the actual language of the employer’s posted notices is not set forth in *Kawasaki Motors*. Cf. United States Postal Serv., 303 N.L.R.B. 463, 470 n.12 (1991) (noting that the “contents” of the notice at issue were “set forth in detail” in the Board’s opinion).
193. *Fashion Fair*, 159 N.L.R.B. at 1444 (“Unless properly and effectively neutralized, the impact of coercive action upon employees is not vitiated just because the illegal acts in question are subsequently rescinded.”); see also Borg-Warner Corp., 234 N.L.R.B. 1283, 1286 (1978) (quoting and applying *Fashion Fair*), enforced, 608 F.2d 1344 (10th Cir. 1979).
Having thus concluded that the employer's unfair labor practices had interfered with the laboratory conditions necessary for a "free and uncoerced choice on the question of representation," the administrative law judge recommended that the election be set aside because a remedy was needed for the employer's "flagrant interference with the free choice of the electorate, regardless of what the assurances against future wrongdoing might have been." The Board subsequently agreed with this reasoning, and adopted the administrative law judge's recommendation.

B. Remedial Efforts That Do Not Satisfy Passavant

1. International Automated Machines

An employer's attempt to repudiate its unfair labor practices may fail to restore the laboratory conditions necessary for a valid election because the repudiation did not satisfy Passavant. In International Automated Machines, for example, the employer had promulgated a rule prohibiting any employee solicitations on behalf of outside organizations on company premises. The Board thus found that, having left its overly broad no-solicitation policy in effect for a substantial period after the election petition was filed, the employer engaged in unlawful conduct that precluded a valid election.

195. Id.
196. Id. at 519, 520. In Minnesota Mining & Mfg. Co., 81 N.L.R.B. 557 (1949), the Board upheld the authority of its administrative law judges (who at that time were called "trial examiners," see Avco Corp., 199 N.L.R.B. 505, 505 n.1 (1972)) to "recommend the setting aside of [an] election." Minnesota Mining, 81 N.L.R.B. at 560 n.15.
198. Id. at 502.
199. Id. at 502, 505.
202. Id. at 1133.
203. In other words, the impact of the employer's unlawful policy was not "too remote to have prevented the free choice guaranteed by Section 7." Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275, 1277 (1961).
204. Int'l Automated Machs., 285 N.L.R.B. at 1134. See also St.Vincent's Hosp., 265 N.L.R.B. 38, 42 (1982) ("We consider [an employer's] maintenance of [an unlawful] rule over a [significant] period of [time] to be a serious restriction of the Section 7 rights of its employees.")
2. Autozone

A similar result was reached in Autozone.\textsuperscript{205} The union in that case filed objections to an election it had lost by a "substantial" margin.\textsuperscript{206} Among other things,\textsuperscript{207} the union alleged that approximately six weeks before the election,\textsuperscript{208} the employer violated section 8(a)(1) of the Act\textsuperscript{209} by removing pro-union literature from company bulletin boards while leaving anti-union literature posted.\textsuperscript{210}

The administrative law judge concluded that the employer’s removal of the union literature did violate section 8(a)(1).\textsuperscript{211} However, the employer argued that by reposting the material approximately three hours after its removal, and apologizing to the employee who had complained about the removal,\textsuperscript{212} it had "effectively cured any unlawful infringement of [its] em-

\textsuperscript{205} 315 N.L.R.B. 115 (1994), enforced, 83 F.3d 422 (6th Cir. 1996).
\textsuperscript{206} Id. at 115. The employer’s margin of victory may be relevant in assessing a union’s objection to a representation election. See NLRB v. Bostik Div., USM Corp., 517 F.2d 971, 975 n.5 (6th Cir. 1975) (noting that “a closeness in election results has been recognized as an important consideration” in determining whether laboratory conditions have been disturbed); Seaward Int'l, Inc., 275 N.L.R.B. 940, 942 n.13 (1985) (observing that where the election results were “close,” a party’s alleged pre-election misconduct “must be closely scrutinized”).
\textsuperscript{207} The administrative law judge indicated that the principle issue in the case was “probably . . . whether [the employer] unlawfully announced to employees that, under the law, it could not reach a final decision on a pay raise . . . because the Union had filed an election petition to represent . . . employees.” Autozone, 315 N.L.R.B. at 115. Such conduct presumably would violate the “well settled” Board rule that “in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture.” Reno Hilton, 320 N.L.R.B. 197, 206 (1995).
\textsuperscript{208} Autozone, 315 N.L.R.B. at 118, 119.
\textsuperscript{209} 29 U.S.C. § 158(a)(1).
\textsuperscript{210} Autozone, 315 N.L.R.B. at 119-20, 145.
\textsuperscript{211} Id. at 120. The NLRB does not give employees an absolute right to post union literature on company bulletin boards. See NLRB v. Southwire Co., 801 F.2d 1252, 1256 (11th Cir. 1986); Group One Broad. Co., 222 N.L.R.B. 993, 998 (1976). However, once an employer permits its employees to use its bulletin boards for any purpose, Section 7 of the Act guarantees their right to post union or other organizational materials. Union Carbide Corp. v. NLRB, 714 F.2d 657, 660 (6th Cir. 1983). Thus, an employer’s discriminatory removal of union literature from a bulletin board violates Section 8(a)(1) of the Act. Container Corp. of Am., 244 N.L.R.B. 318, 318 n.2 (1979), enforced in part and enforcement denied in part, 649 F.2d 1213 (6th Cir. 1981).
\textsuperscript{212} Autozone, 315 N.L.R.B. at 120. An employer’s apology for its unfair labor practices, without more, is generally insufficient to satisfy Passavant. See, e.g., Lucky Stores, Inc., 245 N.L.R.B. 647, 650 (1979) (concluding that an employer’s letter of apology did not satisfy Passavant because it did not constitute “an unambiguous repudiation of . . . [the] unlawful conduct”). See also Fashion Fair, Inc., 159 N.L.R.B. 1435, 1444 (1966) (“Merely making an apology to employees for the misconduct committed [is] ambiguous and insufficient, without clearly identifying the wrongdoing, indicating recognition of the employees’ organizational rights, and assuring them against recurrence of the offenses committed.”).
ployees' Section 7 rights."

The administrative law judge rejected this argument, finding that "the reposting did not effectively disavow the effects of the discriminatory removal under Passavant." In particular, there was no evidence that the employer had given its employees any assurances that it would not interfere with their Section 7 rights in the future. In addition, the employer had engaged in other unlawful conduct, including issuing a "gag rule" prohibiting employees from discussing unions as well as a series of coercive threats that it would retaliate against employees if they unionized.

Because the employer's conduct in removing the union literature from its bulletin boards had not been effectively disavowed, the unfair labor practice was not cured and the administrative law judge recommended that the union's objection to the election be sustained. The Board ultimately agreed with the judge's analysis and, adopting his recommendation, set the election aside and ordered that a new election be conducted.

3. Holly Farms

A comparable result was reached in Holly Farms, although that case


214. Autozone, 315 N.L.R.B. at 120; see also Autozone, 1996 U.S. App. LEXIS 14414, at *17 ("In the instant case, [the employer's] conduct failed to meet the Passavant standards.").

215. Autozone, 1996 U.S. App. LEXIS 14414, at *17. One Board administrative law judge has stated that "absent some affirmative recognition by [an employer] that its past conduct is improper and some expression of willingness not to repeat it, there is an ever-present danger that employees again will be subject to it and, indeed, may become the target of more pernicious unlawful conduct." Lucky Stores, Inc., 279 N.L.R.B. 1138, 1149 (1986).

216. Autozone, 1996 U.S. App. LEXIS 14414, at *17 ("For a repudiation to be effective, it must be . . . free from other proscribed illegal conduct.").

217. Autozone, 315 N.L.R.B. at 123-24, 128. The Board noted that "the Section 7 right to discuss union topics in an organizing campaign may not be prohibited while permitting employees to discuss, during working time, virtually all other topics." Id. at 124 (citing Visador Co., 303 N.L.R.B. 1039, 1041-42 (1991)).


221. Autozone, 315 N.L.R.B. at 145.

222. Id. at 115.

223. Id. at 146.

224. Id. at 115.

primarily involved the propriety of a post-election bargaining order under *Gissel Packing Co.*,226 rather than the validity of the initial election.227 The employer in *Holly Farms* was found to have violated sections 8(a)(1) and (3) of the Act228 by granting a unilateral wage increase to bargaining unit employees during the course of a union organizing campaign.229 The employer contended that a speech given to its employees by a company vice president, in which he “sought to justify the increase on economic grounds and to put to rest ‘the rumor’ that the increase was given because of the [pending] election,”230 had “negated any coercive effect of the wage increase.”231

The Board rejected the employer’s argument.232 The Board noted that the vice president’s speech did not contain any admission of wrongdoing, as required by *Passavant*,233 nor did it occur “in an atmosphere free of other unfair labor practices.”224 The Board therefore agreed with the administrative law judge’s finding that the wage increase was unlawful235 and, together with the employer’s other unfair labor practices,226 “precluded the exercise of a free and uncoerced choice in the election.”237 In finding that “the [employer’s] unfair labor practices . . . had the tendency to undermine majority strength and impede the election process[],” thus making the

226. 395 U.S. 575 (1969); see supra note 64.


It is well established that the mere grant of benefits during the critical [pre-election] period is not, per se, grounds for setting aside an election.... In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits (citations omitted).


232. Id.

233. Id. One Board administrative law judge recently described the admission of wrongdoing as “the first element of the *Passavant* test.” Southwire Co., No. 26-CA-18725, 2000 NLRB LEXIS 660, at *99 (Sept. 26, 2000).


235. Id. at 274-75, 326-28.

236. The administrative law judge, whose findings were ultimately affirmed by the Board, id. at 273, found that the employer had committed “numerous unfair labor practices . . . intended to undermine the Unions’ majority status.” Id. at 354.

237. Id. at 361.
holding of a fair election "unlikely," the Board made the following observation:

[T]he grant of wage increases has a strong coercive effect on employee freedom of choice because they eliminate primary reasons for organization. Additionally, wage increases . . . have been recognized as having a potential long-lasting effect, not only because of their significance to employees, but also because the Board's traditional remedies do not require a respondent to withdraw benefits.  

4. Fieldcrest Cannon

The Board appears to have reached a similar conclusion in Fieldcrest Cannon.240 After losing an election,241 the union in Fieldcrest Cannon filed an objection alleging that the employer had engaged in unlawful surveillance of union meetings and campaign speeches.242 The hearing officer concluded that the employer's "pervasive and purposeful" surveillance of its employees had inhibited their attendance at these events,243 and thereby interfered with the outcome of the election.244 The hearing officer recommended that the Board direct a new election.245

The Board subsequently adopted the hearing officer's findings and recommendation.246 It noted that the employer's conduct was not limited to "isolated actions by possibly overzealous supervisors which might have affected only a small portion of the voting unit."247 The Board instead agreed

238. Id. at 282.
239. Id. at 281-82 (citations omitted).
240. 327 N.L.R.B. 109 (1998). However, the extent to which compliance with Passa-
vant's repudiation requirements was specifically at issue in Fieldcrest Cannon remains un-
clear. See infra note 262.
242. Id. at 109 n.2.
243. Id. See also CBS Records Div., 223 N.L.R.B. 709, 709 (1976) (referring to the
"tendency" of surveillance "to affect the freedom to support or not to support the Union").
244. Fieldcrest Cannon, 327 N.L.R.B. at 109 n.2; cf. Piggly Wiggly, Tuscaloosa Div.,
258 N.L.R.B. 1081, 1097 (1981) (stating that "surveillance . . . is the type of conduct that
tends to have a 'lingering effect' on employees, and thus renders uncertain the possibility
of . . . fair and free . . . election[s]").
245. Fieldcrest Cannon, 327 N.L.R.B. at 109 n.2.
246. Id. at 109 n.3.
247. Id. at 109 n.2. An employer's surveillance of union activities may be "so isolated
that there is no basis for finding a violation of [section] 8(a)(1)." Summit Nursing & Con-
valescent Home, Inc., 204 N.L.R.B. 70, 70 n.1 (1973); see, e.g., NLRB v. Orleans Mfg. Co.,
412 F.2d 94, 96 (2d Cir. 1969) (finding "two isolated incidents" that gave employees the
impression their union activities were under surveillance were "too innocuous to give rise to
a violation of § 8(a)(1)").
with the hearing officer\(^\text{248}\) that the employer's unlawful surveillance of the union meetings was pervasive\(^\text{249}\) and, when coupled with its "failure to repudiate its conduct before the election,"\(^\text{250}\) supported the hearing officer's recommendation.\(^\text{251}\) The Board therefore set aside the original election and directed that a new election be held.\(^\text{252}\)

5. Action Mining

As discussed earlier,\(^\text{253}\) the administrative law judge in *Action Mining*\(^\text{254}\) held that the employer failed to restore the laboratory conditions necessary for a valid election because its attempt to repudiate its unfair labor practices was insufficient under *Passavant*.\(^\text{255}\) Although the Board subsequently held that the employer's repudiation *had* been effective,\(^\text{256}\) its focus on that issue suggests agreement with the judge's conclusion that a repudiation that did not satisfy *Passavant* would have been insufficient to restore the requisite laboratory conditions.\(^\text{257}\)

\(^{248}\) See supra note 255 and accompanying text.

\(^{249}\) *Fieldcrest Cannon*, 327 N.L.R.B. at 109 n.2. With respect to this issue, the Board had previously made the following observation:

> [O]pen surveillance of a union meeting by top officials of an employer... is a violation of Section 8(a)(1) of the Act; this is so because it is calculated, and reasonably tends, to interfere with, restrain, and coerce employees in the exercise of rights guaranteed in Section 7. Such open surveillance cannot be characterized as isolated conduct because by its very nature it not only directly affects the employees subjected to the surveillance, whatever their number, but also is calculated to, and potentially does, affect all employees in the plant.


\(^{250}\) *Fieldcrest Cannon*, 327 N.L.R.B. at 109 n.2. It is not clear from the Board's opinion whether the employer made no attempt to repudiate its unlawful surveillance, or instead simply failed to satisfy *Passavant*. *Compare St. Vincent's Hosp.*, 265 N.L.R.B. 38, 42 (1982) (discussing an employer that "made no effort to repudiate its [unlawful] conduct"), *with Bay Area-L.A. Express, Inc.*, 275 N.L.R.B. 1063, 1063 n.1 (1985) (holding that an employer’s “attempt to repudiate” its unlawful conduct was “not effective” under *Passavant*).

\(^{251}\) *Fieldcrest Cannon*, 327 N.L.R.B. at 109 n.2. *See also Intertype Co. v. NLRB*, 371 F.2d 787, 788 (4th Cir. 1967) (indicating that the “coercive effect” of an employer’s unlawful surveillance of union meetings can be removed “only if the employer... clearly inform[s] all of its employees of its disavowal of what... had [been] done”).

\(^{252}\) *Fieldcrest Cannon*, 327 N.L.R.B. at 109-10, n.3.

\(^{253}\) See supra notes 110-44 and accompanying text.


\(^{255}\) Id. at 666-67.

\(^{256}\) Id. at 654.

\(^{257}\) Id. at 658 (concluding that “the laboratory conditions... remained intact” because the employer’s “*Passavant repudiation... [was] effective*”).
6. Bell Halter, Wireways, and Mariner Post-Acute Network

In contrast to the foregoing cases, there is also Board authority holding that the laboratory conditions necessary for a valid election can be restored by an attempted repudiation that does not satisfy Passavant. In Bell Halter, for example, the employer violated section 8(a)(1) of the Act by maintaining and enforcing an overly broad no-solicitation rule that prohibited any employee distributions of literature on company premises without authorization. The employer argued that by subsequently distributing a notice advising employees that they could, in fact, “distribute literature on their own time (lunch, before work, etc.) in non-work areas such as the cafeteria or parking lot,” it had successfully repudiated its unlawful conduct.

The Board rejected this argument, holding that the employer’s attempted repudiation did not satisfy Passavant. In particular, the notice failed to specifically repudiate the employer’s unlawful no-solicitation rule, or assure employees that the employer would not subsequently inter-

258. See supra notes 201-69 and accompanying text.

259. In addition, in a case in which the Board did not specifically address whether the laboratory conditions necessary for a valid initial election had been restored, but instead considered whether the employer’s unlawful conduct precluded a valid second election, the employer’s “efforts to ameliorate the effects of its unlawful conduct” were held to have “tip[ped] the balance . . . against a finding that a fair election would be rendered impossible,” even though the attempted repudiation was not sufficient to “warrant . . . finding no violation of the Act under the test in Passavant.” Almet, Inc., 305 N.L.R.B. 626, 629 & n.14 (1991).


262. Bell Halter, 276 N.L.R.B. at 1211, 1213-14, 1223.

263. Id. at 1212. Cf. St. Agnes Med. Ctr. v. N.L.R.B., 871 F.2d 137, 143 (D.C. Cir. 1989)(indicating that “an employer may validly prohibit solicitation and distribution in working areas”) (citing Restaurant Corp. of Am. v. N.L.R.B., 827 F.2d 799, 806 (D.C. Cir. 1987)).


265. Id. at 1214. See also St. Vincent’s Hosp., 265 N.L.R.B. 38, 42 (1982) (holding that an employer’s “mere revision of [an unlawful] rule does not constitute an effective repudiation”).

266. Bell Halter, 276 N.L.R.B. at 1214. But see Atl. Forest Prods., Inc., 282 N.L.R.B. 855, 872 & n.13 (1987) (“[W]hen unlawful restrictions on in-plant solicitation have been promptly rescinded, the Board has found such violations ‘effectively cured’ even when [Passavant’s] conditions have not been met.”).

267. Bell Halter, 276 N.L.R.B. at 1213. Cf. MPG Transp., Ltd., 315 N.L.R.B. 489, 489 n.1 (1994) (finding that an attempted repudiation was insufficient under Passavant because it “did not refer to the initial [unlawful conduct] and specifically deny its substance”), enforced, 91 F.3d. 144 (6th Cir. 1996); Hoyt Water Heater Co., 282 N.L.R.B. 1348, 1357 (1987) (finding that an employer’s no-solicitation rule was unlawful even though the employer “did not enforce the rule,” because the employer “failed to apprise the employees of any repudiation of the rule”).
fere with their statutory rights. While acknowledging that *Passavant* is not to be applied in a "highly technical or mechanical manner," the Board explained:

In the eyes of the employees, [the no-distribution rule] remains intact and unaffected by [the subsequent] notice. The effect of the notice is simply to create the impression among employees of benevolence on the part of [the employer] in authorizing that which it could not under normal circumstances have lawfully prohibited in any event. Rather, by granting authorization for lawful distributions, [the employer's] notice suggests that authorization is not a matter of right and is subject to withdrawal.

However, the Board rejected the union's argument that because the employer's unremedied unfair labor practice occurred during the critical pre-election period, it destroyed the laboratory conditions necessary for a valid election, and thus invalidated the vote rejecting the union. The Board indicated that the employer's attempt to repudiate its unlawful policy was the "most significant relevant factor" in determining whether the policy had affected the outcome of the election. The attempted repudiation complied with most of the *Passavant* requirements, and notified employees that they "would not be in violation of any existing [company] rule in undertaking union distributions in appropriate areas on [the company's] premises." Thus, although the repudiation did not satisfy *Passavant*, it

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268. *Bell Halter*, 276 N.L.R.B. at 1213-14. See also *Laverdiere's Enters.*, 297 N.L.R.B. 826, 831 n.11 (1990) (noting that "the Board's test for repudiation of unlawful conduct" requires the employer to "assure the employees of the free exercise of their statutory rights").


270. *Id.* See also *Baldor Elec. Co.*, 245 N.L.R.B. 614, 615 (1979) ("[U]nder Board law, the Employer must show that it informed the employees generally that it no longer had an invalid no-solicitation/no-distribution rule, and that henceforth it would only enforce a valid rule."); *Bellinger Shipyards, Inc.*, 227 N.L.R.B. 620, 623 (1976) (asserting that an employer's "rescission of [an] unlawful [no-solicitation] rule should be accomplished with at least as much ceremony as its enforcement of the old [rule].").


272. *Id.* at 1208.

273. *Id.* The Board had stated in a previous case that the determination of whether an employer's unfair labor practices "could have affected the results of the election" is based upon "the number of violations, their severity, the extent of dissemination, the size of the [bargaining] unit, and other relevant factors." Super Thrift Mkts. Inc., 233 N.L.R.B. 409, 409 (1977) (emphasis added).

274. *Bell Halter*, 276 N.L.R.B. at 1213. In particular, the Board noted that the employer's notice was timely, unambiguous, adequately published, and "specific regarding the incident which gave rise to the notice." *Id.* In addition, there was no evidence of "further restrictions on employee distribution rights." *Id.*

275. *Id.* at 1223.

276. *Id.* at 1214.
was sufficient to render the employer's unlawful conduct "de minimis insofar as having an impact on the election." The Board therefore certified the election results.

In Wireways, Inc., the employer had promulgated a rule prohibiting its employees from distributing union literature during breaks. The administrative law judge found that this rule violated section 8(a)(1). However, he also concluded that by verbally retracting the rule several days later, and posting a notice stating that "employees may distribute literature in non-working areas as long as this is not done when you are supposed to be working or in a manner which would interfere with the work of other employees," the employer had "effectively repudiated the restriction on employees' Section 7 rights" and thus "corrected" its unlawful conduct. The judge therefore found no need to recommend a further Board remedy.

The Board disagreed with this analysis, holding that "the alleged repudiation was ambiguous and, therefore, ineffective" under Passavant. It therefore issued a cease-and-desist order, and required the employer to post a remedial notice. The Board nevertheless certified the election results, expressing no disagreement with the administrative law judge's conclusion that the employer's retraction of its unlawful no-distribution rule was sufficient to avoid invalidation of the election, even though the retraction was

277. Id. at 1223; cf. Bellinger Shipyards, Inc., 227 N.L.R.B. 620, 620 (1976) (finding that the employer's "unlawful no-solicitation rule" had been "so substantially remedied by the [employer's] subsequent conduct that the entire situation [was] one of little significance"). See also Lucky Stores, Inc., 279 N.L.R.B. 1138, 1149 (1986) (indicating that whether the employer "repudiated its unlawful conduct" is the issue of "perhaps the greatest significance" in applying the de minimis doctrine).

278. Bell Halter, 276 N.L.R.B. at 1208. But see Baldor Elec. Co., 245 N.L.R.B. 614, 615 (1979) ("Where... the Employer has invalid no-solicitation/no-distribution rules which have been published and distributed to all employees and thereafter enforced by the Employer against some employees, it is necessary, in order to assure a free election, that the Employer generally repudiate the rule to all employees.").

280. Id. at 249.
281. Id.
282. Id.
283. Id. at 253.
284. Id. at 249.
285. Id.
286. Id. at 245. The Board noted that "[e]ven assuming... that the other [Passavant] conditions have been met," neither the verbal retraction nor the posted notice "made specific reference to the distribution of union literature." Id.; cf. Farm Fresh, Inc., 305 N.L.R.B. 887, 887 n.1 (1991) (finding an employer's attempted repudiation "ineffective under Passavant because it did not refer to or acknowledge the unlawful [conduct].").
287. Wireways, 309 N.L.R.B. at 245.
288. Id. at 246.
289. Id. at 253-54. The Board found it unnecessary to reach this issue because the employer's promulgation of the rule "did not occur during the critical [pre-election] period."
not sufficient to obviate the need for a Board remedy under *Passavant*.\(^{290}\) Significantly, the judge, in concluding that the election results were valid,\(^{291}\) made the following observations with which the Board expressed no disagreement:

> [A]n 8(a)(1) violation is not a fortiori conduct requiring the election be set aside. The Board does not apply a per se rule. Moreover conduct critical enough to be considered objectionable to an election atmosphere may be *de minimus* [sic] and thus not require setting the election aside. . . . Applying the Board's reasoning to the instant case the alleged unfair labor practices, whether meritorious or not, do not constitute conduct sufficient to set the election results aside.\(^{292}\)

A similar result is also suggested by the analysis in *Mariner Post-Acute Network Inc.*\(^{293}\) The employer in *Mariner* was alleged to have engaged in conduct that interfered with its employees' free choice in an election\(^{294}\) by sending a letter to all eligible voters purporting to advise them of the "negative aspects of unionization."\(^{295}\) The Board held that this letter, which warned the employees that they might lose their jobs if unionization ultimately led to a strike,\(^{296}\) improperly interfered with the election because

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\(^{290}\) *Id.* at 245 n.2. In considering election objections, it is generally "the Board's policy to look only to objectionable conduct occurring between the time the petition is filed and the election is held." *Long-Airdox Co.*, 277 N.L.R.B. 1157, 1159 (1983). However, the Board occasionally may "take into account actions occurring outside the critical period, to the extent that they add meaning or context to the days and weeks leading up to the election." NLRB v. *Wis-Pak Foods, Inc.*, 125 F.3d 518, 521 (7th Cir. 1997).

\(^{291}\) *Id.* at 254.

\(^{292}\) *Id.* at 253 (emphasis added).


\(^{294}\) *Mariner* may be an example of a representation case in which the employer's alleged interference with the requisite laboratory conditions did not actually rise to the level of an unfair labor practice. *Id.* at 1309 n.4 (noting that the Board hearing officer had incorrectly referred to the employer's "violations," rather than to its "objectionable conduct"). See also *Life Savers, Inc.*, 264 N.L.R.B. 1257, 1257 (1982) ("It has long been held that conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the laboratory conditions of an election. The reverse situation is not necessarily true, however, since Section 8(a)(1) must be read in conjunction with the [employer free speech] provisions of Section 8(c).") (citation omitted).

\(^{295}\) *Mariner Post-Acute Network*, 162 L.R.R.M. (BNA) at 1308. See also *Life Savers, Inc.*, 264 N.L.R.B. at 1257, which states:

> [A]n employer is free to communicate to its employees its views concerning the consequences of unionization so long as the communications do not contain a threat of reprisal of force or promise of benefit, and so long as the prediction of the effects of unionization is based on objective facts.

(Internal quotation marks and citation omitted.)

\(^{296}\) Specifically, the objectionable portion of the letter stated: "LOST JOBS: The . . . Union could mean some . . . employees lose their jobs. When the union went on strike at
it did not adequately explain the consequences of an economic strike and the reinstatement rights of economic strikers. Citing Larson Tool & Stamping Co., the Board explained:

If an employer tells employees that they may lose their jobs if they go on strike, without informing them that permanently replaced strikers who make unconditional offers to return to work have the right to full reinstatement when positions become available and to be placed on a preferential hire list if positions are not available, the statement is objectionable because it conveys the prospect of total job loss.

The employer argued that it had sufficiently explained the reinstatement rights of economic strikers in mandatory employee meetings held shortly after the letter was sent. In those meetings, the employer had explained that it could hire permanent replacements in the event of an economic strike, and also indicated that at the conclusion of such a strike the

Demopolis, the nursing home hired new employees, and when the strike ended, many of the union's supporters had no jobs to which to return. Mariner Post-Acute Network, 162 L.R.R.M. (BNA) at 1308 (emphasis omitted); cf. Hajoca Corp., 291 N.L.R.B. 104, 106 (1988) (holding that a statement that employees "would lose their jobs if they participated in an economic strike" violates section 8(a)(1) of the Act because it "constitute[s] a threat to sever the employment relationship should the employees exercise rights protected by Section 7").

The Board's legitimate concern with protecting an employer's right to discuss potentially unfavorable aspects of unionization does not extend so far as to sanction propaganda that overtly raises the prospect of job loss and leaves employees on their own to divine that the "loss" is somehow less than total because it is conditioned by a right to return to work after the replacement's departure.

For the author's previous discussion of an employer's right to permanently replace economic strikers, see Michael D. Moberly, Striking Bargains: The At-Will Employment of Permanent Strike Replacements, 18 Hofstra Lab. & Emp. L.J. 167 (2000).
strikers are permitted to return to work “only when openings occur.”

The Board rejected the employer's argument, holding that its letter “had a ... tendency to coerce employees” and thus “interfere with their free choice in the election,” even when considered in conjunction with the employer's statements at the subsequent employee meetings. Because the employer did not actually discuss its letter during those meetings, the Board concluded that the employer had not effectively repudiated the objectionable statements contained in the letter. However, in concluding that there had been no effective repudiation under the circumstances at issue, the Board suggested that it may not always be necessary for an employer to comply with “all of the requirements for repudiation ... set forth in Passavant” in order to restore the laboratory conditions necessary for a valid election.

Both this suggestion and the comparable results in Bell Halter, Inc.

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304. Mariner Post-Acute Network, 162 L.R.R.M. (BNA) at 1309. However, the Board noted that the employer's statements at the meetings were not themselves alleged to have been objectionable. Id.; cf. Santa Rosa Blueprint Serv., Inc., 288 N.L.R.B. 762, 763 (1988) (“The Board has held that an employer who truthfully informs employees of the possibility of being permanently replaced during a strike, but fails to explain all of the possible consequences of such replacement, ... does not violate Section 8(a)(1).”).

305. Mariner Post-Acute Network, 162 L.R.R.M. (BNA) at 1309; cf. Miss. Extended Care Ctr., Inc., 202 N.L.R.B. 1065, 1082 (1973) (asserting that an employer's “inaccurate statements concerning the absolute right to permanently replace employees who went on strike ... clearly constituted improper interference with [its] employees' right to exercise a free choice as to a union representative or vote”).


In evaluating [an employer's] preelection campaign, we begin from the premise that the oral and written statements must be construed together to determine their reasonable tendency to coerce the employees. Both the courts and the Board have long held that statements and written materials must be viewed in context and not in isolation.

307. Mariner Post-Acute Network, 162 L.R.R.M. (BNA) at 1309, n.3. The Board in Mariner explained: “Because the Employer did not acknowledge, let alone repudiate, the improper implications of the 'Lost Jobs' statements, it of course did not assure the employees that [it] would not engage in objectionable conduct in the future.” Id. at 1309. See also Fashion Fair, Inc., 159 N.L.R.B. 1435, 1444 (1966) (indicating that an employer's attempted repudiation is “insufficient” unless it “clearly identifies the wrongdoing ... and as-sur[es] ... against recurrence of the offenses committed”).

308. Mariner Post-Acute Network, 162 L.R.R.M. (BNA) at 1309 n.3 (discussing the view of Member Hurtgen).

and Wireways, Inc.\textsuperscript{310} are consistent with the Board’s analysis in other representation cases.\textsuperscript{311} In particular, the Board has indicated that an election will not be set aside unless the employer’s unfair labor practices were “sufficiently widespread as to have effected the conduct of the election.”\textsuperscript{312} In other words, “\textit{de minimis}” unfair labor practices occurring during the pre-election period do not interfere with the laboratory conditions necessary for a valid election,\textsuperscript{313} even if the employer makes no effort to repudiate them.\textsuperscript{314} And if the existence of \textit{unremedied} unfair labor practices does not necessarily preclude a finding that an election was valid,\textsuperscript{315} the fact that an employer’s attempted repudiation of its unfair labor practices did not \textit{fully} remedy them\textsuperscript{316} obviously should not preclude such a finding.\textsuperscript{317}

The analysis in Mariner, Bell Halter and Wireways is also correct as a matter of policy.\textsuperscript{318} In particular, both the Board\textsuperscript{319} and the judiciary have

\textsuperscript{311}. \textit{See} Yellow Taxi Co. of Minn., 262 N.L.R.B. 702, 705 (1982) (Zimmerman, D., concurring) (noting that “the parties who depend on the processes of the NLRB deserve consistent and predictable decisions”). \textit{But see} Trenor, Inc. v. NLRB, No. 96-60130, 1997 U.S. App. LEXIS 12694, at *29 (5th Cir. Apr. 8, 1997) (Garza, J., dissenting) (“[T]he Board’s task in an election challenge is not a quest for on-point precedent, but to make an ad hoc determination based on the facts presented.”).


\textsuperscript{313}. \textit{See supra} note 80 and accompanying text; \textit{cf.} 1 \textit{THE DEVELOPING LABOR LAW}, supra note 18, at 339 (observing that “conduct that constitutes an unfair labor practice will \textit{almost always} also violate the Board’s election rules”) (emphasis added).

\textsuperscript{314}. Gray Line of the Black Hills, 321 N.L.R.B. 778, 793 (1996) (“Ordinarily, \textit{though not universally}, commission of unfair labor practices during the pre-election period . . . is conduct which warrants setting aside the election and conducting a second one.”) (emphasis added); Detroit Edison Co., 310 N.L.R.B. 564, 565 n.7 (1993) (noting one Board member’s disagreement with the contention that “the commission of an employer’s unfair labor practice will almost always result in the overturning of an election”).

\textsuperscript{315}. Gasko & Meyer, Inc., 255 N.L.R.B. 658, 660 (1981) (observing that “not every unfair labor practice . . . is of such significance as will cause the election to be set aside”); \textit{cf.} Guerdon Indus., Inc., 218 N.L.R.B. 658, 665 (1975) (Kennedy, R., dissenting) (“It is not not every unfair labor practice which nullifies an employer’s right to an election.”).

\textsuperscript{316}. The issue under \textit{Passavant} is whether the employer “has . . . \textit{entirely} cured its unfair labor practice.” Mohawk Liqueur Co., 300 N.L.R.B. 1075, 1086 (1990) (emphasis added), \textit{aff’d sub nom.} Gen. Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308 (D.C. Cir. 1991); \textit{see also} F.L. Thorpe & Co., 315 N.L.R.B. 147, 151 n.11 (1994) (noting that \textit{Passavant} addresses whether the unfair labor practice was “completely remedied”), \textit{enforced in part and rev’d in part}, 71 F.3d 282 (8th Cir. 1995).

\textsuperscript{317}. \textit{See, e.g.}, Ga. Hosiery Mills, 207 N.L.R.B. 781, 785 (1973) (finding that an unfair labor practice that had only been “substantially” remedied was “at best a \textit{de minimis} [sic] . . . violation”). \textit{But cf.} Raysel-IDE, Inc., 284 N.L.R.B. 879, 886 (1987) (concluding that an employer’s violation of section 8(a)(1) was “not \textit{de minimis}” where its remedial efforts were “inadequate to repudiate effectively [its unlawful] conduct” under \textit{Passavant}).

\textsuperscript{318}. The Board in \textit{Bell Halter} indicated that, as a matter of policy, “voluntary remedial
expressed the view that "self-initiated remedies . . . should be encouraged whenever possible," [320] because voluntary compliance with the law is deemed to be "a prerequisite to the continued efficacy of the National Labor Relations Act." [321] A strict application of Passavant in representation cases (and, for that matter, in other contexts) [322] conflicts with this policy by discouraging employers from attempting to remedy their unfair labor practices. [323]

While these policy concerns have prompted criticism of Passavant, [324] the Board recently declined to abandon its holding in that case. [325] Passavant thus remains, at least for now, [326] "the law on the issue of repudiation of unfair labor practices." [327] Bell Halter, Inc., 276 N.L.R.B. 1208, 1213 (1985).

320. NLRB v. Intertherm, Inc., 596 F.2d 267, 277 (8th Cir. 1979); see also Kawasaki Motors Corp., 257 N.L.R.B. 502, 519 (1981) (stating "Board precedent indicating the Board's approval of an employer's efforts to halt the effects of its own illegal activity") (footnote omitted).
323. See Webco Indus., 327 N.L.R.B. at 173 (discussing a Board member's contention that Passavant should be overruled); Galen Hosp. Alaska, Inc., 327 N.L.R.B. 876, 877 n.6 (1999) ("Member Hurtgen does not necessarily agree with all of the requirements for repudiation, as set forth in Passavant Memorial Hospital.").
324. See, e.g., Webco Indus., 327 N.L.R.B. at 173 (observing that the argument for overruling Passavant "fails to persuade us"); cf. Local 1-2, Utility Workers of America, 312 N.L.R.B. 1143, 1144 n.5 (1993) (rejecting an argument that would have required the Board to "disavow the test set out in Passavant ... for effective repudiation of [unlawful] conduct").
325. It is not uncommon for the Board's view of an issue to change with changes in its membership. See Epilepsy Found. N.E. Ohio v. NLRB, 268 F.3d 1095, 1097 (D.C. Cir.
Nevertheless, one administrative law judge has indicated that there is some flexibility in the case’s application, depending on the circumstances under which it is being invoked.

The Board itself expressed a similar view in Broyhill Co., where it specifically declined to apply Passavant “in a highly technical and mechanical manner.” A number of other Board decisions likewise “give credit to [an employer] who ameliorates its unfair labor practices even though the effort does not meet the strict requirements of Passavant.” As demonstrated by the analysis in Bell Halter, Inc., this flexible approach to the application of Passavant is also likely to be taken in at least some representation cases.

VI. CONCLUSION

Satisfaction of the Passavant requirements is not determinative of whether an employer’s repudiation of its unfair labor practices has restored the laboratory conditions necessary for a valid election. Although compliance with Passavant will ordinarily be sufficient to restore laboratory conditions, that may not be true in all cases. In addition, an employer’s
failure to comply with Passavant, while also potentially significant, does not necessarily compel the setting aside of an election that was potentially tainted by the employer's commission of pre-election unfair labor practices.

This flexible treatment of the impact of employer repudiation efforts is consistent with the Board's general approach to determining whether laboratory conditions existed during a representation election. That approach involves an ad hoc, case-by-case appraisal of the employer's (or union's) objectionable conduct to determine whether it "substantially interfered with the election." As the Board has stated: "We must evaluate the circumstances with due regard to the realities, and consider... the total factual picture within the frame of reference [in] which the election was held, and the many facts and factors that necessarily must intrude themselves in making a sound judgment."

337. See supra notes 201-69 and accompanying text.
338. See supra notes 270-345 and accompanying text. Indeed, one court has cited empirical evidence suggesting that "far from causing the employees to vote against the union," an employer's commission of unfair labor practices during an election campaign actually causes employees "to appreciate that they need a union, and consequently improve[s] the union's chances of winning in a secret ballot." NLRB v. Lovejoy Indus., 904 F.2d 397, 401 (7th Cir. 1990) (discussing JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY (Russell Sage Found. 1976)).
339. The Board has indicated that its test for determining whether laboratory conditions exist is not "fixed and immutable." Sewell Mfg. Co., 138 N.L.R.B. 66, 70, supplemented, 140 N.L.R.B. 220 (1962); see also Ereno Lewis, 217 N.L.R.B. 239, 240 (1975) (Penello, J. dissenting) (stating that "the 'laboratory conditions' standard... is binding upon the Board and the courts only until such time as the Board chooses to change it"); cf. Leonard Bierman, Judge Posner and the NLRB: Implications for Labor Law Reform, 69 MINN. L. REV. 881, 899 n.105 (1985) (asserting that "[t]he NLRB’s application of its laboratory-conditions doctrine has not been entirely consistent"); Julius Getman, Labor Law and Free Speech: The Curious Policy of Limited Expression, 43 Md. L. Rev. 4, 11 n.41 (1984) (noting that "the NLRB has been inconsistent in its adherence to the laboratory conditions standard").
340. See Lovejoy Indus., 904 F.2d at 402 ("A jurisprudence of 'I know it when I see it'... approximates if it does not wholly capture the Board's approach to how much coercion spoils an election..."); Lach-Simkins Dental Labs., Inc., 186 N.L.R.B. 671, 672 (1970) ("We... treat each situation as it arises on its own merits.").
341. See supra note 158; see also Amalgamated Clothing & Textile Workers v. NLRB, 736 F.2d 1559, 1563 (D.C. Cir. 1984) ("In carrying out the NLRA's goal of ensuring employee free choice, the Board must... consider carefully... the circumstances surrounding the original election...."); V.I.P. Limousine, Inc., 274 N.L.R.B. 641, 641 (1985) (observing that "the Board must assess whether the particular circumstances... destroy[ed] the requisite laboratory conditions under which elections must be conducted"); King, supra note 19, at 192 (noting that "the Board [has] espoused a case-by-case analysis of all the factual circumstances in determining the legality of [an employer's pre-election] conduct").
342. Jennie-O Foods, Inc., 301 N.L.R.B. 305, 341 (1991); see also Waste Stream Mgmt., Inc., 315 N.L.R.B. 1088, 1133 (1994) (indicating that "the standard for interference necessary to set aside a board-conducted election is substantial interference with 'laboratory conditions'").
343. N.Y. Shipping Ass'n, 108 N.L.R.B. 135, 139 (1954); see also Archer Laundry Co.,
The Board’s treatment of employer repudiations in the election context is also consistent with its current view of *Passavant*, which holds that the requirements of that case are not to be applied "mechanistically," but flexibly depending upon the circumstances of the particular case. Thus, and perhaps most importantly, the Board’s flexible treatment of the repudiation issue has the benefit of encouraging, or at least not discouraging, employer efforts to comply with the Act by voluntarily remediining their unfair labor practices. That is undoubtedly a result to be applauded.

150 N.L.R.B. 1427, 1431 (1965):

[In considering whether or not certain activities of the participants in a preelection campaign prevent the voters from making a free and untrammeled choice in selecting a bargaining representative, a determination should be based upon the total complex of the activities. Isolated incidents which may, in one context be interpreted as interference with the "laboratory conditions" for an election, may, as elements of another campaign theme, take on an entirely different meaning and convey an entirely different impression to employees.

346. See supra notes 330-35 and accompanying text.