

**Gulton Industries—Femco Division and Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner.** Case 11-RC 4386

February 5, 1979

DECISION ON REVIEW, ORDER, AND  
DIRECTION OF THIRD ELECTION

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On March 31, 1978, the Regional Director for Region 11 issued a Third Supplemental Decision and Direction of Third Election in which he sustained one of the Employer's six objections to the election held on February 16, 1978, pursuant to a Second Supplemental Decision, Order Severing Cases,<sup>1</sup> and Direction of Second Election.<sup>2</sup> Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed a timely request for review<sup>3</sup> of the Regional Director's decision on the grounds that it does not reflect Board precedent. The Employer filed a statement in opposition to the Petitioner's request for review.

The National Labor Relations Board, by telegraphic order dated May 3, 1978, granted the Petitioner's request for review, and the Employer thereafter filed a brief on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review, including the Petitioner's request for review, the brief in support thereof, and the Employer's brief on review, and makes the following findings.

In agreement with the Regional Director,<sup>4</sup> we find merit in the Employer's Objection 5. This objection alleges, in substance, that the Petitioner undermined the Board's neutrality in the second election when, in a series of preelection leaflets distributed to unit employees, it mischaracterized a settlement agreement

approved by the Regional Director in Case 11-CA-7097 and thereby misled employees into believing that the Board had found the Employer guilty of unfair labor practices.

The Regional Director, relying on our decision in *Formco, Inc.*,<sup>5</sup> found objectionable a leaflet distributed by the Petitioner on February 10, 1978, which stated, *inter alia*, that a statement made by the Employer "not only was . . . a lie, but it was also illegal. They've [i.e., the Employer] even had to post a notice on the bulletin board . . . stating that they won't threaten us with a loss of benefits to discourage our interest in Union representation. . . . Gulton's the only one that's broken the law in this campaign." The Regional Director noted that in two leaflets subsequently distributed (on February 14 and 15) the Petitioner included statements which indicate that a second election had been scheduled because the Employer had "ignored your rights and committed serious violations of the National Labor Relations Act" and "because of all the unfair labor practices committed by" the Employer. The Regional Director concluded that the leaflets show that the settlement agreement and the Union's mischaracterization of it played an important part in the Union's campaign. Quoting the Board's language in *Formco, supra*, the Regional Director found that "[t]he Petitioner's misstatements were reasonably calculated to mislead employees into believing that the Board had judged the Employer to have committed unfair labor practices whereas, in truth, such practices were never proven." Accordingly, the Regional Director ordered that the election conducted on February 16, 1978, be set aside and directed that a third election be held. We agree with the Regional Director that the Petitioner has engaged in conduct which has compromised the Board's neutrality and warrants setting aside the election.

Our dissenting colleague would distinguish the instant case from *Formco, Inc., supra*, on the basis that the Union's statement that the Employer violated the law is not the equivalent of a statement that the Board has found that the Employer violated the Act. Yet in *Formco* the Petitioner did not state that "the Board" had found the Employer guilty of engaging in unfair labor practices but rather that "Management was found guilty of engaging in unfair labor practices." Similarly, here, the Petitioner did not state that "the Board" had found the Employer guilty of unfair labor practices but rather that "[t]hey have ignored your legal rights and committed serious

<sup>1</sup> The Acting Regional Director ordered that Cases 11-CA 7085, 11-CA 7167, and 11-CA 7097 be severed from Case 11-RC 4386.

<sup>2</sup> The tally of ballots showed that of approximately 149 eligible voters 74 cast ballots for and 62 against the Petitioner. There were five challenged ballots cast, an insufficient number to affect the outcome of the election.

<sup>3</sup> Although the Petitioner entitled its request "Petitioner's Exceptions to Third Supplemental Decision and Direction of Third Election," we will, contrary to the urging of the Employer, treat the document filed by the Petitioner as a request for review.

<sup>4</sup> The relevant portions of the Third Supplemental Decision and Direction of Third Election are attached hereto as an Appendix.

<sup>5</sup> 233 NLRB 61 (1977). In *Formco*, the Board found objectionable a union's letter to employees, mailed subsequent to the execution of a settlement agreement, which stated, "[A]s you know by now, management was found guilty of engaging in unfair labor practices and was ordered to post a 60 day notice."

violations of the National Labor Relations Act which is why we're even having another election." Just as the Board alone was deemed capable of adjudicating unfair labor practices in *Formco*, so too it is the Board alone which is empowered to direct a second election. Thus, contrary to our dissenting colleague, we find Petitioner's mischaracterization of the settlement agreement herein impermissibly implicated the Board in its partisan election campaign.

Nor are we willing, as is our dissenting colleague, to engage in speculation as to how the Union could have permissibly conveyed its messages. The language which our colleague posits is simply not the case before us. The Union here did not couch its statements in a manner which made clear to employees that it was only the Union claiming unlawful conduct, rather than that a violation had actually been found, and the campaign materials found objectionable contain no indication upon their face that it is a settlement agreement to which the statements refer.

Finally, we cannot agree with our colleague's position that the Union's statement that the Employer "had to" post a notice is not objectionable because it was actually required to do so under the terms of the applicable settlement agreement. The overall tenor of the Union's statements was such as to lead the employees to conclude that a violation had been found by this Agency and that the Employer was therefore required to post a notice as a means of remedying such violation. It is within that context that we must adjudge the nature of the Union's statements. Accordingly, we agree with the Regional Director that the February 16, 1978, election should be set aside and a third election conducted.

Accordingly, we hereby sustain Objection 5, and we shall set aside the election and order that a new one be held.

#### ORDER

It is hereby ordered that the election hereinbefore held be, and it hereby is, set aside.

[Direction of Third Election and *Excelsior* footnote omitted from publication.]

MEMBER TRUESDALE, dissenting:

In disagreement with the majority, I would not find that leaflets distributed by the Union shortly before the second election in this case impermissibly characterized the settlement agreement, and I would therefore reverse the Regional Director and certify the Union as the collective-bargaining representative in the unit found appropriate.

The leaflet distributed by the Union on February 10 stated, *inter alia*:

I know now that not only was this statement a lie, but it was also illegal. They've even had to post a notice . . . stating that they won't threaten us with a loss of benefits. . . .

Gulton's the only one that's broken the law in this campaign.

The leaflet distributed on February 14 stated, in part:

They have ignored your legal rights and committed serious violations of the National Labor Relations Act which is why we're even having another election.

Finally, the leaflet distributed on February 15 states, in part:

The reason we are even having another election is because of all of the unfair labor practices committed by the company.

The majority characterizes the leaflets as intimating that the Board had found the Employer guilty of various unfair labor practices, and therefore finds that the distribution of the leaflets compromised the Board's neutrality and misled employees. The basis for this decision is *Formco, Inc.*, 233 NLRB 61 (1977), in which a union leaflet stated that the employer had been "found" guilty of various violations when, in fact, there had been a settlement agreement containing a nonadmissions clause concerning the alleged violations. I find that case inapplicable to the present facts.

In my view, the Union's statement that the Employer violated the law is not the equivalent of a statement that the Employer has been found guilty of violating the Act. Previous leaflets distributed by the Union had discussed the charges, informed employees that the Union still believed that the Employer had violated the law, and asserted that the Union had settled the charges only to minimize delay and give employees another opportunity to vote. The settlement agreement did not require that the Employer cease proclaiming its innocence, nor did it require that the Union cease proclaiming that the Employer had violated the Act. I do not believe that my colleagues would have found the leaflets objectionable had the leaflets stated:

Despite our assent to the settlement agreement, we still believe that (1) not only was this statement a lie, but it was also illegal; (2) Gulton's the only one that's broken the law; and (3) they have committed serious violations of the NLRA.

Moreover, I believe that a fair reading of the leaflets, in context, would lead a reasonable reader to conclude that this was what the Union was saying - not,

as the majority here finds, that the Union meant to preface each statement with "The Board found that . . . ." Indeed, my conclusion is buttressed by the fact that two of the three leaflets which were found objectionable by the Regional Director mention neither the Board nor the Act.

I also would not find it objectionable to state, as the union leaflets did, that the Employer "had to" post a notice. The only possible objection to this statement is that the leaflet did not explain *why* the Employer "had to" post a notice; it is beyond dispute that the Employer was, in fact, required to post a notice under the terms of the settlement agreement. Similarly, in the context of the leaflets previously distributed concerning the settlement agreement and the Union's reasons for agreeing to have another election, I would not find it objectionable to state, as the union leaflets did, that actions which the Union believed to be unlawful were the reason for having another election. I would not require a fully detailed procedural description of the settlement agreement, drafted with the elegance of a Board decision, whenever the Union referred to its continuing belief that the Employer violated the Act.

In view of the foregoing, I would reverse the Regional Director and certify the Petitioner.

#### APPENDIX

##### *OBJECTION 5:*

The Employer contends that Petitioner, in a series of leaflets, mischaracterized a Settlement Agreement and misled employees into believing that the Employer had committed unfair labor practices when in fact such practices were never proven and thereby destroyed the neutrality of the Board. In support thereof, the Employer submitted six of the Petitioner's campaign leaflets (attached as Appendices B through G).

In order to properly evaluate these leaflets, it is necessary to understand the disposition of certain unfair labor practice cases during the period between elections—August 25, 1977, to February 16,

On August 31, 1977, a Settlement Agreement executed by Petitioner and the Employer on August 16, and 29, 1977, respectively, involving Case No. 11-CA-7085 was approved by the undersigned. The Settlement Agreement contained a non-admission clause.

On September 1, 1977, the Petitioner filed its charge in connection with Case No. 11-CA-7167. On October 14, 1977, the undersigned issued a complaint with respect to Cases Nos. 11-CA-7085 and 11-CA-7167. That complaint set aside the above-mentioned Settlement Agreement in Case No. 11-CA-7085. The

complaint alleged numerous violations of Section 8(a)(1) and (3) and sought a bargaining order as a remedy.

On November 29, 1977, the undersigned issued a complaint in Case No. 11-CA-7097 which alleged other violations of Section 8(a)(3) on the part of the Employer.

On January 11, the parties entered into a Settlement Agreement remedying the violations alleged in the complaint. The Settlement Agreement was approved by the undersigned on January 16. The Settlement Agreement contains a nonadmission clause.

On January 11, the Petitioner and Employer entered into a Stipulation agreeing to a second election on February 16.

On about October 19, 1977, the Union distributed a leaflet to employees entitled, "NLRB ISSUES A COMPLAINT AGAINST GULTON AND SEEKS A BARGAINING ORDER—HEARING DATE IS SET FOR DEC. 20TH." <sup>11</sup>

This leaflet reads in part:

As a result of this investigation, the Labor Board has issued a complaint against Gulton and is seeking a bargaining order.

The Labor Board only seeks a bargaining order in the most serious cases—only when a company's conduct is so severe and unlawful as to undermine employees' rights to organize and make a fair election impossible. The National Labor Relations Board, in its investigation, has found that the Company has interfered with and is still interfering with the rights guaranteed to you by Section 7 of the National Labor Relations Act by the following acts and conduct.

The leaflet then quotes 13 allegations from the complaint.

The leaflet then goes on to describe the conduct cited in the complaint as being serious violations and illegal.

The leaflet continues:

The statements have been found to be illegal and untrue. . . .

The N.L.R.B. has found enough evidence to indicate that the Company is guilty of the charges filed. Because of the massive illegal behavior on the part of the Company, the Labor Board maintains that the election results are not valid. Employees voted no because they believed the Company's illegal lies, threats and promises. Therefore, the N.L.R.B. is seeking a bargaining order. It is very unusual for the Board to seek a

<sup>11</sup> This leaflet is attached as Appendix B.

bargaining order. Just because a Union asks for one does not mean the Labor Board seeks one. It is only because the N.L.R.B. has already found the Company guilty of very serious and numerous charges in their investigation, that they are going after a bargaining order.

The N.L.R.B. has set a hearing for December 20th. *At the hearing it is the National Labor Relations Board who presents the case against Gulton. The Labor Board will try Gulton for their violations.* If the Labor Board is successful, which we are certain they will be, the N.L.R.B. will certify Teamsters Local 391 to act as your bargaining representative just as if we won the election. The N.L.R.B. maintains that before the Company started to interfere with your rights by their illegal behavior, the majority of you had selected Teamsters Local 391 to act as your collective bargaining agent to represent you in negotiations for higher wages, better benefits, and improved working conditions.

The Employer cites *Formco, Inc.*<sup>12</sup> as its authority in overturning the election on the basis of the above leaflet.

In *Formco* the union had issued a letter with the following language: "as you know by now, management was found guilty of engaging in unfair labor practices and was ordered to post a 60-day Notice." In *Formco* the Board cited *Dubie-Clark Co., Inc.*<sup>13</sup> as being dispositive of the objectionable nature of the above statement. It appears to the undersigned that the instant case is distinguishable from both *Dubie-Clark* and *Formco*. In both cases, the statements made by the Union dealt with mischaracterizations of Settlement Agreements. In the instant case no Settlement Agreement was outstanding and the alleged misstatements dealt with a complaint.

The undersigned finds the leaflet in question here to be more alligned [sic] with Exhibit B in *Monmouth Medical Center*,<sup>14</sup> and is of the opinion that that case is dispositive of the issues herein. Accordingly, I am not of the opinion that the leaflet discussed above warrants setting aside the election.

On approximately January 23, the Petitioner circulated the leaflet attached as Appendix C. This leaflet was distributed after approval of the Settlement Agreement on January 16, and after a new election had been agreed to between the parties.

The leaflet is entitled "Bargaining Order vs Election—Why a Settlement?"

In this leaflet the Union again characterized cer-

tain conduct as set forth in the earlier complaint as being illegal.

The leaflet reads in part, "The National Labor Relations Board, after a preliminary investigation, thought the charges so important that they never certified the election results and were seeking a bargaining order. The bargaining order could have taken up to two years if the Company kept on appealing the decision."

The leaflet also quotes a portion of the Settlement Agreement but states that the Employer had "agreed" to keep it posted for 60 days.

The leaflet ends with a discussion of the Settlement Agreement and the Union's opinion that it was a complete victory. The leaflet does not indicate at any point that the Employer had been found guilty or had been forced to post a notice.

The Employer submitted a leaflet attached as Appendix D which was distributed by the Union on February 10. The leaflet is signed by an employee and was one of a series distributed by the Union purporting to show the feelings of various employees who had switched their allegiance to the Union.

The leaflet reads in part:

They really had me believing the garbage about losing all of our benefits. I know now that not only was this statement a lie, but it was also illegal. They've even had to post a notice on the bulletin board this time stating that they won't threaten us with a loss of benefits to discourage our interest in Union representation. . . .

I'm tired of hearing about the mafia, corruption, etc. Gulton's the only one that's broken the law in this campaign.

In the opinion of the undersigned this leaflet clearly mischaracterizes the Settlement Agreement of January 16, by indicating that the Employer had been forced to post the Notice to Employees. The leaflet indicates that the Board was punishing the Employer for its "illegal" conduct by forcing it to post the Notice. In accordance with the Board's decision in *Formco* I would set the election aside on the basis of this leaflet.

The Employer submitted the leaflet attached as Appendix E which was distributed by the Union on February 13. After a careful reading of this leaflet it appears that there is nothing objectionable about it standing alone.

Attached as Appendix F is the Union leaflet distributed February 14. This leaflet contains the language in part, "They have ignored your legal rights and committed serious violations of the National Labor Relations Act which is why we're even having another election."

<sup>12</sup> 233 NLRB 61.

<sup>13</sup> 209 NLRB 217.

<sup>14</sup> 234 NLRB 328.

Attached as Appendix G is a leaflet distributed by the Union on February 15. The leaflet reads in part, "The reason we are even having another election is because of all of the unfair labor practices committed by the company."

The Union maintains that at all its meetings following the Settlement Agreement it made a point of telling employees that the Employer had not been found guilty and the only way it could be found guilty is if it went through the process of a trial. However correct the above might be, that is not the message conveyed in the leaflets. The Union admits that not

all employees attended its meetings.

It is clear from the leaflets discussed above that the Settlement Agreement and the Union's mischaracterizations of it played an important part in the Union's campaign. It appears to the undersigned that the Board's language in *Formco, supra*, applies in the instant case: "The Petitioner's misstatements were reasonably calculated to mislead employees into believing that the Board had judged the Employer to have committed unfair labor practices, whereas, in truth, such practices were never proven." Accordingly, the undersigned finds that Employer's Objection 5 warrants setting aside the election.