Mercury Industries, Inc. *and* Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, Local No. 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 30-RC-3271

September 29, 1978

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 30 on February 16, 1978, an election was conducted on March 22, 1978, under his direction and supervision among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that there were approximately 148 eligible voters, with 138 ballots cast, of which 88 were for and 47 against the Petitioner. Thereafter, the Employer filed a timely objection to conduct affecting the results of the election.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation on May 4, 1978, and issued and duly served on the parties his report and recommendations on the objection. In his report, the Regional Director recommended that the objection be overruled in its entirety and that the Board issue a certification of representative. Thereafter, the Employer filed a timely exception to the Regional Director's report, and the Petitioner filed a brief in opposition to the Employer's exception.

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.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time production and maintenance employees, truckdrivers, shipping and receiving employees, including production and material expediters employed by the Employer at its Richland County Industrial Park, Richland Center, Wisconsin facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

5. The Board has considered the entire record in this proceeding, including the Employer's objection, the Regional Director's report, the Employer's exception and brief, and the Petitioner's answering brief, and hereby adopts the Regional Director's findings, conclusions, and recommendations only to the extent consistent herewith.

The facts are not in dispute.

On March 15, 1 week before the election, the Petitioner mailed, in envelopes embossed with its seal, name, and return address, campaign propaganda to most or all of the employees listed on the *Excelsior* list. The propaganda consisted of four unattached sheets of letter size paper. The first page of this distribution was a letter to the unit employees which extolled the advantages of representation by the Teamsters. This letter was printed on the Petitioner's letterhead and included the Petitioner's address, telephone number, seal, and International affiliation. The last paragraph of this letter states:

> On the following page is a copy of the ballot that will be handed to you when you go to vote. Please do not write anything on it other than just an X in the box of your choice.

The second page of the distribution, which was dated and designated "Page 2," reproduced a portion of the Board's notice of election which had been posted at the Employer's plant. This page set forth the schedule according to which unit members would be released from their work stations in order to vote and contained a rendering of the sample ballot. Below the depiction of the ballot had been inscribed the adjuration, "Vote Teamster!!." The ballot had been altered by an X having been placed in the "Yes" box. A solid black arrow pointed from the inscription to the "Yes" box, transecting the perimeter of the ballot. At the right side of the page was typed "Donald Johnson, Organizer, Teamsters Union Local No. 695." Opposite that, in the left margin was marked, "DJ: ncv." The third and fourth pages of the distribution, which were neither dated nor paginated, consisted respectively of a cartoon which advocated unionism and notice of an organizational meeting.

The Employer, relying on *Allied Electric Products, Inc.*, 109 NLRB 1270 (1954), and its progeny, contends that the Petitioner's conduct in reproducing and altering the sample ballot in the instant case was clearly objectionable. We agree and therefore decline to adopt the Regional Director's recommendation that the Petitioner be certified.

In making this decision we reaffirm our determination, which we first expressed in *Allied*, to protect the Board's processes from misuse by a participant in a Board election who seeks to secure a partisan advantage by suggesting, directly or indirectly, that the Agency endorses a particular choice. As we stated in *Allied* and reiterated in our recent decision in *GAF Corporation*, 234 NLRB 1209 (1978), the reproduction of a writing purporting to be a Board document, which has been altered for partisan purposes, must tend to suggest to its reader that the Agency has granted the proponent of the document its support or approval. It is paramount that the Board's neutrality remain inviolate both in fact and in appearance. To this end, our concern is not with the substance of partisan additions made to an Agency document, but with the possible impact such an adjunct might have upon the freedom of choice of a voter. As our decision in *GAF* makes clear, form is of central concern; the Board cannot countenance the use of its name or processes in a manner which has the tendency to mislead. The Petitioner's very use of an altered Board ballot creates the impression that the Agency has allied itself with the Union's campaign.

We thus restate our adherence to the doctrine announced in *Allied* that we will not permit the reproduction of any writing which purports to be a copy or rendering of the Board's official secret ballot, "other than one completely unaltered in form and content."

[Direction of Second Election omitted from publication.][1]

MEMBER PENELLO, dissenting:

I dissent from the majority's holding that the Petitioner engaged in objectionable election conduct by circulating as election propaganda an altered sample ballot where it was clear from the face of the propaganda that the modifications were its own. Precedent demands that the Board, in cases involving the alleged misuse of Agency documents, weigh all the relevant facts as to the impact of the alleged abuse upon the rights of the employees to an untrammeled election rather than employ a *per se* rule setting the election aside. In returning to a mechanical adherence to the doctrine announced in *Allied Electric Products, Inc.*, *supra*, as reaffirmed in *GAF Corporation*, *supra*, the majority ignores the trend of the case law in this area and reverts to a stance which exalts form over substance.

The petitioner in *Allied* circulated a copy of the Board's official secret ballot among the voting units' employees which it had altered by placing an X in the ballot's "Yes" box. At the bottom of the ballot, the petitioner had added the instruction, "Do not mark any other way—mark 'Yes' box only." The Board determined that the petitioner's conduct tended to interfere with free choice in the election and accordingly set it aside. The opinion stated that the Board must necessarily be concerned with the protection of its procedures designed to provide fair elections if it is to maintain, in image as well as in fact, its impartiality. The reproduction of a document that purports to be an official Board ballot, but which in fact has been altered for campaign purposes, the decision asserted, necessarily suggests that the adjunctive propaganda appears with the Agency's approval, thereby influencing the voter's choice in the election. In order to preserve inviolate the Board's integrity in administering the election process, the Board declared that in the future it would set aside the results of any election in which the successful party had used an altered ballot for campaign propaganda purposes. The *Allied* rule was premised upon the assumption that employees are necessarily misled into believing that the Board had granted its imprimatur to the proponent of any altered Agency ballot or document. Thus, neither the intention of the altering party nor the extent or context of the alterations was a relevant point of inquiry; any modification was a *per se* violation. The triviality of many of the violations considered under this doctrine, however, coupled with the harshness of the remedy, has caused the Board overtime to skew both the language and the analysis applied in its consideration of altered ballot cases. In these later cases, an important facet of the Board's inquiry has been whether the source of the alteration was adequately revealed so as to preclude any impression on the part of the voters that the Agency had sponsored or approved the partisan additions to the ballot.

This approach was hinted at in *Rett Electronics, Inc.*,[2] where the Board adopted the conclusions and recommendation of the Regional Director and refused to set aside the results of an election in which the petitioner had distributed a leaflet containing a partial reproduction of the Board's official secret ballot. The Regional Director concluded, and the Board agreed, that the ballot represented in the leaflet was not a reproduction under the *Allied* standards. The Regional Director's report further concluded that no reasonably prudent industrial employee would have been left with the impression that the ballot in this case suggested Agency approval of its proponent. Finally, the Regional Director stated with the Board's approval that the *Allied* rule was not one to be ap-

[1] [*Excelsior* footnote omitted from publication.]

[2] 169 NLRB 1111 (1968).

plied mechanistically without consideration of the allegedly offensive document's effect on the free will of the voters.

The Board continued the use of this analysis in its decision in *Stedman Wholesale Distributors, Inc.*[3] As in *Rett*, the majority declined to set aside an election in which the employer had circulated a partial reproduction of the Board's ballot. Though the "no" box had been marked with an X the majority found that the ballot in question did not sufficiently resemble the official ballot so as to amount to a reproduction under the *Allied* rule. The majority also found that the ballot would not have misled the voters to believe that the Agency had endorsed any particular choice in the election.

The full extension of this analysis occurred in the Board's decision in *Associated Lerner Shops of America, Inc.*[4] In this case, the employer had circulated a copy of the sample ballot which was incorporated into a campaign leaflet. Below the ballot had been inscribed the message "your X in this square will mean you do *not* want this union" (emphasis supplied). A drawing of a hand with its index finger extended pointed from the slogan to the "No" box on the ballot. Opposite this message was printed, "issued by Lerner Shops." The Board concluded that the sample ballot in question purported to be nothing more than a campaign document prepared by the employer and, as such, was unlikely to mislead employees into believing that the Agency endorsed the appended message.

The Board has continued to apply this analysis in its most recent decisions involving altered ballots. In *Silco, Inc.*,[5] the Board sustained objections to conduct of an election where the employer circulated among its employees copies of the sample ballot which had been modified by addition of the adjuration "Vote No on July 21." The Board noted that the employer's depiction of the sample ballot was very similar to the structure of the official ballot. The gravamen of the objectionable conduct in *Silco*, however, was that the ballot contained no identification which would inform its reader as to its source. The Board contrasted this situation with the one obtaining in *Associated Lerner Shops* where the reproduced ballot was identified as having been issued by the employer. The opinion stated that the failure to identify the source of the altered ballot necessarily tended to suggest that the Agency had approved the partisan additions.

Turning to the facts of the instant case, it is clear that the source of the altered ballot was most adequately identified. The offending document was part of a four-page distribution which the Petitioner had mailed to the voters in envelopes marked with its name, address and logogram. The page on which the altered ballot was reproduced was dated and paginated. At the bottom right-hand side of the margin was inscribed, "Donald Johnson, Organizer, Teamsters Union Local No. 695." Opposite this, in the left margin, was printed, "DJ: ncv." The contents of the first page of the letter also make reference to the ballot. In this context it is wholly incredible to believe that any employee who viewed the ballot, either in isolation or as a part of the distribution, would think that the Agency had endorsed the Petitioner, thereby interfering with the employees' freedom of choice. As so often happens in cases such as these, the submersion of the substance of a rule in order to comport with its form has brought about an unjust result.[6] In the instant case, the majority has decided to frustrate the demonstrated desire of these employees to have union representation in order to protect their uncoerced freedom of choice. The motivation of the majority is certainly not disingenuous, but the result of their decision is assuredly anomolous.

[3] 203 NLRB 302 (1973).
[4] 207 NLRB 348 (1973).
[5] 231 NLRB 110 (1977).

[6] The majority first signaled its intent to return to a mechanical interpretation of *Allied* in its recent decision in *GAF Corp.*, 234 NLRB 1209 (1978). In the dissent in that case, Member Jenkins and I stated the facts presented in *GAF* did not bring it within the parameters of the *Allied* doctrine and its progeny. In discussing the majority's failure properly to apply relevant precedent in that decision, the dissent noted that the Board had, prior to *GAF*, rejected the use of a *per se* approach which would require the setting aside of any election in which there had been an alleged misuse of Board documents. The dissent reminds that the critical inquiry in all such cases is whether the misuse would have given the voters the misleading impression that the Board had granted its support to one of the parties, thereby impinging on the voters' freedom of choice. As in the instant case, the majority in *GAF* did not treat this question. There, as here, the presumption was made that the form alone was sufficient to mislead.