

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 04-9577
04-9591

HONEYVILLE GRAIN, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Honeyville Grain, Inc. (“the Company”) to review, and on the cross-application of the National Labor Relations Board to enforce, an order of the Board finding that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”), by

failing and refusing to bargain with Local 166 of the International Brotherhood of Teamsters, AFL-CIO (“the Union”). The Decision and Order, issued on July 30, 2004, and reported at 342 NLRB No. 61 (D&O 1-3)¹ is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to remedy unfair labor practices. The Company’s petition for review and the Board’s cross-application for enforcement were timely filed, as the Act places no time limitation on such filings. This Court has jurisdiction over both pursuant to Section 10(e) and (f) of the Act, because the Company is incorporated, and transacts business, in Utah.

The Board’s unfair labor practice order is based, in part, on findings made in an underlying representation proceeding, *Honeyville Grain, Inc.*, Board Case No. 31-RC-8075. Pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)), the record before this Court therefore includes the record in that proceeding. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

¹References are to the original record, as follows: “D&O” refers to the Board’s decision and order in the unfair labor practice proceeding; “DCR” refers to the Board’s decision and certification of representative; “HO” refers to the hearing officer’s report; “Tr” refers to the transcript of the postelection hearing. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Section 9(d) does not, however, give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to “enforc[e], modify[], or set[] aside in whole or in part the order of the Board.” The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *River Walk Manor, Inc.*, 293 NLRB 383, 383 n.2 (1989); *Medina County Publications*, 274 NLRB 873 (1985).

STATEMENT OF THE ISSUE PRESENTED

After the Union prevailed by a substantial margin in an election to represent a unit of the Company's employees, the Company objected to remarks, which it characterized as impermissible appeals to religious prejudice, made at a single meeting during the Union's organizing campaign. The question before this Court is whether the Board acted within its discretion in overruling the Company's objection, and therefore properly determined that the Company violated Section 8(a)(5) and (1) of the Act by its admitted refusal to bargain with the Union.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

The Company operates a fleet of trucks out of its Rancho Cucamonga, California facility as part of its business of manufacturing, warehousing, and distributing food products. (D&O 1; Complaint ¶ 2(a), Answer.) On February 4, 2002, the Union petitioned the Board for an election, in a unit to consist of all full-time and regular part-time drivers employed by the Company at or out of that facility. (HO 1; Petition.) Pursuant to a decision and direction of election, the Board conducted a secret-ballot election on April 12, 2002. (D&O 1, DCR 1; Decision and Direction of Election.) The Union won the election by a vote of 23 to 7 with 2 challenged ballots. (DCR 1; Tally of Ballots.)

The Company filed multiple objections to conduct affecting the results of the election, only one of which it pursues before this Court. The relevant objection is that in a meeting 5 days before the election, two union agents referred to the religion of the Company's owners and managers, allegedly in an attempt to inflame the drivers' religious prejudices. (DCR 4; Employer's Objections No. 6.) Following a hearing, the Board's hearing officer recommended that the Board overrule each of the Company's

objections, including the one asserted here. (HO 22.) Upon consideration of the Company's exceptions to that recommendation, the Board (Chairman Battista, Members Liebman and Schaumber) adopted the hearing officer's findings and recommendations, and certified the Union as the exclusive collective-bargaining representative of the Company's Rancho Cucamonga drivers. (DCR 1-12.)

B. The Unfair Labor Practice Proceeding

Following the Union's certification, the Company refused the Union's request to bargain. (D&O 1.) Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (D&O 1; Complaint, Amendment to Complaint.) The Company filed an answer in which it reasserted its objection to the Union's certification in the representation proceeding. (D&O 1; Answer.) The General Counsel subsequently filed for summary judgment and the Board issued a notice to show cause why summary judgment should not be granted. (D&O 1; Motion to Transfer and for Summary Judgment, Order and Notice to Show Cause.) The Company filed a response, reiterating its prior contentions and admitting that it refused to bargain with the Union. (D&O

1; Response to Notice to Show Cause and Opposition to Motion for Summary Judgment 1.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Battista, Members Liebman and Schaumber) rejected the Company's request that the complaint be dismissed and granted the General Counsel's motion for summary judgment. The Board found that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company had neither offered to adduce any newly discovered and previously unavailable evidence, nor shown any special circumstances that would require the Board to reexamine its decision to certify the Union as the drivers' representative. (D&O 1.) Accordingly, the Board concluded that the Company's undisputed refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (D&O 2.)

The Board's order requires the Company to cease and desist from refusing to bargain with the Union, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O 2.) Affirmatively, the Board's order requires the

Company, upon request, to bargain with the Union, and to post copies of a remedial notice. (D&O 2.)

SUMMARY OF ARGUMENT

The Board reasonably rejected the Company's contention that isolated references by union agents to the religion of the Company's owner and managers required the overturning of an election in which the drivers overwhelmingly voted to be represented by the Union. Under the reasoning set forth in *Sewell Mfg. Co.*, 138 NLRB 66 (1962), and its progeny, the Board has consistently refused, with the imprimatur of the courts, to overturn elections based on comments with racial or religious overtones that "were not inflammatory or part of a sustained, persistent attempt to appeal to the racial or religious prejudices of eligible voters." (DCR 7.) *See, e.g., Catherine's, Inc.*, 316 NLRB 186 (1995). Here, the Board reasonably found that the evidence failed to establish that the Union's campaign involved a sustained appeal to religious prejudice or that the religious remarks were inflammatory.

The Company implicitly conceded that religion was not a central theme of the Union's campaign. It offered no evidence of any references to religious affiliation outside of the remarks, which were made at only 1 of the 10 union meetings; nor did it introduce any evidence concerning pre-existing

religious tension in the workplace that might have been brought to the surface through subtle prompts. The Company also made no attempt to offer an alternative explanation as to how the comments could have inflamed any religious prejudices of the drivers.

Instead, the Company seeks to avoid its evidentiary deficiencies by suggesting that the mere mention of a particular religion transformed the union agents' statements into religious slurs, obviating the need for any further showing that the statements were likely to inflame religious prejudice and shifting the burden to the Union to prove that the comments were germane. The decision on which the Company primarily bases this argument, however, involved a "bald bigoted slur" which is analytically distinct from the comments here, which were to the effect that the Company's profits should be shared with the workers rather than being diverted to the Mormon Church. *See NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53, 57 & n.10 (3d Cir. 1981) (union officer called the company vice president a "stingy jew"). Accordingly, the Board was well within its discretion to find that the remarks did not impede or prevent the unit members from making a reasoned choice, and to uphold the election results. (DCR 8.)

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTION CONCERNING THE UNION'S REFERENCE TO THE RELIGION OF THE COMPANY OWNERS, AND THEREFORE PROPERLY DETERMINED THAT THE COMPANY'S UNDISPUTED REFUSAL TO BARGAIN WITH THE UNION VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

A. Introduction

Section 8(a)(5) of the Act (29 U.S.C. §158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” Here, the Company has admittedly refused to bargain with the Union based on its objection to the underlying election. (D&O n.1; Response to Notice to Show Cause and Opposition to Motion for Summary Judgment 1.) Accordingly, if the Board acted within its wide discretion in overruling the Company’s election objection and certifying the Union, the Company’s refusal to bargain violated Section 8(a)(5) and (1) of the Act. (29 U.S.C. § 158(a)(5) and (1)).² *NLRB v. A.J.*

² Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of the rights protected by Section 8(a)(5) of the Act therefore results in a “derivative” violation of Section 8(a)(1). *See NLRB v. Newark Morning Star Ledger Co.*, 120 F.2d 262, 265 & n.1, 267 (3d Cir. 1941).

Tower Co., 329 U.S. 324, 330 (1946); *NLRB v. Triangle Express, Inc.*, 683 F.2d 337, 338 (10th Cir. 1982).

According to testimony credited by the hearing officer and the Board, in the course of a single, several-hours long meeting, either one or two union agents mentioned that: (1) the Company was run by Mormons and its profits were being given to the Mormon church; (2) sometimes Mormons are missionaries and missionaries speak good Spanish; and (3) companies have tax incentives to give profits to churches, which should be shared with the workers instead. (DCR 4, HO 17.)³ The Company contends that these remarks, unrepeated at any other point during the organizing campaign, sufficiently inflamed religious prejudice and hatred among the drivers that their selection of the Union in the subsequent election should be overturned. In contrast, the Board found that the Company had not demonstrated that the Union “overstressed and exacerbated racial or religious feelings through a

³ The Company’s witnesses, Enrique Erazo and Jose Maldonado, testified inconsistently concerning the comments addressed to the drivers assembled at the meeting. Erazo testified that only Rene Torres, a company driver and member of the Union’s organizing committee (HO 4, 7, Tr 256-57), mentioned the Mormon Church in his remarks. (Tr 37-41, 75-76). Maldonado, however, testified that both Torres and David Acosta, a business agent with a distinct local of the Union (HO 7, Tr 195-96), discussed Mormons. (Tr 149-51, 155-56, 174-76.) Only employee Torres, as the Union’s witness, confirmed that his comments at any point implicated the Mormon Church. (Tr 298-304, 308.)

deliberate appeal to prejudice,” and determined that the election result should stand. (DCR 8.)

B. Standard of Review

This Court reviews Board decisions concerning election results only for abuse of discretion. *See NLRB v. DPM of Kansas, Inc.*, 744 F.2d 83, 85-86 (10th Cir. 1984). That discretion is especially broad when the Board acts “to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946), *quoted in NLRB v. Triangle Express, Inc.*, 683 F.2d 337, 338 (10th Cir. 1982). “There is a presumption that ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees.” *NLRB v. Dixon Industries, Inc.*, 700 F.2d 595, 599 (10th Cir. 1983). “A showing of misconduct prior to an election, without more, is insufficient to deny enforcement of the Board’s order. Interference with the employees’ exercise of free choice must be present in the record to such an extent that an inference can be drawn that the conduct materially affected the election results.” *Worley Mill, Inc. v. NLRB*, 685 F.2d 362, 368 (10th Cir. 1982). Accordingly, a party seeking to set aside an election’s results “bears a heavy burden of demonstrating that the election was not fairly conducted.” *Dixon Industries*, 700 F.2d at 599. That “heavy burden” pertains even when parties

allege interference based on “racial or religious remarks.” *M&M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1573 (11th Cir. 1987).

The Board’s underlying findings of fact are “conclusive” if supported by substantial evidence in the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. American Can Co.*, 658 F.2d 746, 752 (10th Cir. 1981). This Court has explained that its standard of review of a Board order is a narrow one in which the agency is given the benefit of the doubt, since the substantial-evidence test requires only “the degree [of evidence] that would satisfy a reasonable factfinder. Furthermore, if the Board has made a plausible inference from the evidence [the Court] may not overturn its findings, although if deciding the case, [it] might have made contrary findings.” *Webco Industries, Inc. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir. 2000). *Accord Universal Camera*, 340 U.S. at 488.

C. The Board Acted Within Its Discretion in Rejecting the Company’s Election Objection

1. The Board’s test for alleged racial or religious appeals

In rejecting the Company’s objection to the election result, the Board applied a test developed through decades of decisions concerning preelection appeals to prejudice. The origins of that test date back to *Sewell Manufacturing Co.*, 138 NLRB 66, 70 (1962), a case involving an

employer's "deliberate, sustained appeal to racial prejudice" within its workforce. The *Sewell* decision overturned an election in which employees rejected union representation, where the employer had for 4 months distributed propaganda materials focused on the union's support for the civil rights movement and racial integration, including a photograph of a white union official dancing with a black woman together with a story concerning "race mixing." *Id.* at 66-68.

The *Sewell* Board began by noting its ultimate concern for "whether the challenged propaganda has lowered the standards of campaigning to the point where . . . the uninhibited desires of the employees cannot be determined in an election." *Id.* at 71. It then made clear that a party's deliberate attempts "to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals" would constitute grounds for setting aside an election. *Id.* at 71-72. The Board further announced a burden-shifting paradigm in which a party that had attempted to inflame racial sentiments could only avoid election nullification by carrying the burden to show that its racial message was nonetheless truthful and germane. *Id.* at 72.

In the decades following *Sewell*, the Board has decided numerous cases involving allegations that election results were tainted by statements referencing race, religion, or ethnicity. Throughout those cases, the Board

has consistently refused, as it did here, to set aside elections where the comments “were not inflammatory or part of a sustained, persistent attempt to appeal to the racial or religious prejudices of eligible voters.” (DCR 7.)

For example, in *YKK, Inc.*, the Board found inflammatory the union agents’ repeated references to the employers as “Japs” or “damn Japs” together with written materials stating “Remember Pearl Harbor,” “Japs Go Home,” “Japs speak with forked tongue[s]” and “slant eyes[,]” and accordingly set aside the union’s election victory. 269 NLRB 82, 84 (1984). In contrast, the Board, in applying *Sewell*, *YKK*, and other precedents, concluded that a union agent’s one-time claim at a preelection meeting that the employer had called his employees “dumb niggers[,]” was insufficient to overturn a pronunion election result. *Beatrice Grocery Products, Inc.*, 287 NLRB 302, 303 (1987), *enforced mem. sub nom. Martha White Foods, Inc. v. NLRB*, 872 F.2d 1026 (6th Cir. 1989). The Board reached that result, in part, because the racial reference was not sustained, nor was the slur employed as part of an inflammatory attack on a particular racial, ethnic, or religious group. *Id.* at 302-03. More recently, the Board in *Catherine’s, Inc.*, 316 NLRB 186 (1995), held that a union agent’s remarks at a single preelection meeting identifying the employer’s owner and his attorneys as

Jewish, were “insufficient to warrant setting aside the election as they were isolated and lacked inflammatory appeal.”

Circuit courts on review have adhered to the same criteria. In cases presenting closer questions than the one here, both the Fifth and Seventh Circuits concluded that isolated campaign propaganda and rhetoric, focused on traditional economic issues that simultaneously carried racial overtones, fell outside of the *Sewell* standard. *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 926-28 (5th Cir. 1976) (finding noninflammatory two union cartoons depicting “Uncle Tom” and a black man being kicked out of a welfare office, as well as exhortations that “black people should stick together” and historical references to slavery at two union meetings); *Arlington Hotel Co. v. NLRB*, 712 F.2d 333, 337-38 (8th Cir. 1983) (finding no inflammatory effect from one-time comparisons of a manager to Hitler and of the workplace to a slave ship).

In cases with dramatically different facts than those of the instant dispute, application of the same standards has produced contrary results. Where an overt religious slur was employed as part of a directly abusive attack on management, the Third Circuit invoked the *Sewell* line of authority to require a hearing at which the offending party would have borne the burden of persuasion. *NLRB v. Silverman’s Men’s Wear, Inc.*, 656 F.2d 53,

57-60 (3d Cir. 1981) (union officer called the company vice president a “stingy jew” at a preelection union meeting). In *NLRB v. Katz*, 701 F.2d 703, 705 (7th Cir. 1983), the court rejected an election result where the union had engaged in a direct and protracted appeal to religious prejudice. A priest, addressing a predominantly Catholic workforce at a union meeting, followed a totally irrelevant discussion of the movie “Holocaust” with commentary that the employer’s owners “are Jewish and they’re getting rich while we’re getting poor [,]” and “Jewish people are rich and we are poor and killing ourselves for them.” *Id.* In deciding to set aside the subsequent pronoun election result under the *Sewell* line, the Seventh Circuit also considered additional religious and race-based rhetoric concerning conflicts between Jews and Blacks, and rumors of managerial references to Mexicans as “dumb” and “greedy.” *Id.* at 705-06, 708.⁴ The instant case hardly presents either sort of egregious behavior at issue in *Silverman’s* or *Katz*.

As a number of circuit courts have explained, racial or religious remarks which are neither inflammatory nor at the core of a party’s

⁴ Notably, despite the profusion of racial and religious verbiage in *Katz*, the Seventh Circuit explicitly based its decision to overturn the election on distinct threats of violence and retaliation, which it considered in tandem with the religious appeals. 701 F.2d at 708-09. That court has since limited construction of its holding in *Katz* accordingly. See *Uniroyal Technology Corp. v. NLRB*, 98 F.3d 993, 1001 n.22 (7th Cir. 1996).

campaign are treated as any other recognizable campaign propaganda, meaning that the Board and the courts need not delve into the truth and falsity of such remarks.⁵ See *Case Farms of North Carolina, Inc., v. NLRB*, 128 F.3d 841, 845-46 (4th Cir. 1997) (citing cases). In *Case Farms*, for example, the Fourth Circuit ruled that a union flyer accusing the employer of firing its entire Amish workforce at another plant in order to hire Latinos whom it could pay less and treat worse was neither an inflammatory appeal to ethnic prejudice, nor was it unrecognizable as partisan propaganda. *Id.* at 844-49. Thus, despite evidence that the flyer contained factual misrepresentations, it did not violate the rules emanating from either *Sewell* or *Midland*. *Id.*

2. The Board reasonably found no sustained or inflammatory religious appeal

The Board, recognizing the long settled distinction “between sustained, deliberate, calculated appeals to racial prejudice . . . and isolated casual remarks appealing to prejudice[,]” reasonably found that the isolated comments here provided no basis for setting aside the election under *Sewell*

⁵ Under the Board test announced in *Midland Nat’l Life Ins. Co.*, 263 NLRB 127, 132-33 (1982), and applied by this Court in *NLRB v. DPM of Kansas, Inc.*, 744 F.2d 83, 86 (10th Cir. 1984), misleading campaign statements operate to set aside an election only in the rare circumstance where they are unrecognizable as propaganda.

and its progeny. (DCR 6-7.) It is essentially undisputed that the references to Mormonism were outside of the core issues of the Union’s campaign. As the Board explained, “[t]he comments at issue were made at only one of about 10 union meetings. The Employer offered no evidence that there was any other injection of religious comment into the campaign[.]” (DCR 8; Tr 421-22, 479.) Thus, despite the Company’s effort to label the references to Mormonism as “repeated” through its own sheer repetition of the term (24 references by our count), the Board was correct to treat them as “isolated” to one portion of one meeting, in the context of the Union’s months-long organizing campaign.⁶

The Board likewise reasonably concluded that the instant record contains no evidence of an inflammatory appeal. The Board reached that conclusion after noting the hearing officer’s finding “that the [Company]

⁶ The record further suggests that the remarks concerning Mormonism were not even central to the speech of the speaker who made them. The testimony of the Company’s lead witness, Enrique Erazo, who described at greater lengths than any other witness the remarks of union agent Rene Torres that touched on Mormonism, is extremely telling in this regard. In response to the initial question about what he recalled Torres saying at the meeting, Erazo stated:

that [the drivers] deserve a better opportunity for better wages, Company benefits and I would have the opportunity to have those. (Tr 37.)

After receiving this ill-fitting response to the Company’s theory of an inflammatory religious appeal, its attorney had to fish three more times for Erazo’s recollection of Torres’ meeting remarks before receiving a response that mentioned the Mormon Church at all. (Tr. 38-39.)

had not shown that the [Union's] religious comments were inflammatory, why the statements may have appealed to employees' religious prejudices, or how the statements inhibited employees' ability to vote." (DCR 5-6.)

Given that dearth of evidence, the Board had little more than descriptions of the allegedly inflammatory comments themselves to consider.

As the Seventh Circuit has explained, "[a] statement is racially inflammatory if on its face it is intended to produce or exploit strong racial prejudice, and is in fact likely to produce or exploit such racial prejudice." *State Bank of India v. NLRB*, 808 F.2d 526, 541 (1986). The remarks at issue were not inflammatory statements because on their face, they were simple descriptions of behavior or status that did not even rise to the level of slurs. There were no comments generally disparaging Mormons, nor was vulgarity employed to signal that the company owners, as Mormons, deserved any special disdain.

The mild remarks in the instant case stand in sharp distinction to other preelection comments found to be inflammatory by the Board and the courts. Those offending comments include references to employers as: a "stingy jew[,]" *Silverman's*, 656 F.2d at 57, "damned Jews [who] are no good" and "took their money from the poor hardworking people[,]" while "[u]s blacks were out in the cotton field[,]" *M&M Supermarkets*, 818 F.2d at 1569-70,

and “Japs” together with written materials stating “Remember Pearl Harbor,” “Japs Go Home,” “Japs speak with forked tongue[s]” and “slant eyes.” *YKK*, 269 NLRB at 84. The shared trait of these slurs is that they disparage their subjects because of religion or race by referencing that characteristic in a facially derogatory fashion. Their apparent purpose is to inflame the existing prejudices within the workforce against members of those groups.

Rather than gratuitously fanning the flames of prejudice, the comments in the instant case focused on the primary issue in this and many other representation campaigns: the way in which the Company was allocating its financial resources. The union agents claimed that companies in general had tax incentives to give their profits to churches, and that this Company in particular was giving its profits to the Mormon Church. (Tr 38-39, 73-76, 149-51, 156, 174-76.) In that context, the union agents asserted, and the Company later offered evidence to support (Tr 123-26), that Mormons ran the Company. (Tr 38.)⁷

⁷ As noted at p.17 above, even if those assertions were completely untrue, because they were propounded by union agents at a union-sponsored event, they were clearly identifiable as partisan propaganda and could not have run afoul of the rule in *Midland*, 263 NLRB at 132-33.

Asserting that there was a unity of religious or charitable sentiment amongst the Company's decision makers would naturally lend credence to the argument that the Company's profits were being funneled into a church rather than being shared among the workforce. Examining the few scant testimonial descriptions of the statements that are in evidence makes clear that the identification of the Company owners' religious faith by union agents Rene Torres or David Acosta was made in exactly that context.⁸ (Tr 38-41, 73-76, 149-51, 155-56, 174-76, 298-304, 308.) As discussed at n.6 above, the most detailed testimony was that of Enrique Erazo, who testified that Torres said:

So, just as you have the opportunity right now, [the drivers] have rights to benefits. So, the money that the Company was making – was a rich Company and so, the money that the Company was making, they needed to share it with every worker and improve the benefits to workers. Since the Company was a Company run by Mormons, [the Union] said that they would [] see to it that [the Company] would make better contributions –[the Company] did to the church and they would also distribute or share that money with Missionaries going out of the country and because that money was tax deductible and that is why they would give part of that money to the Mormon Church instead of giving it to – sharing it with the workers – the opportunity that [the drivers] have in

⁸ The Company offered no analysis as to how the remark “sometimes Mormons are missionaries and missionaries speak good Spanish[,]” (DCR 8, HO 17), could have appealed to religious prejudice, and union agent Torres explicitly denied that his two references to missionaries during the meeting carried any negative connotations. (Tr 301-04, 308.)

order to better their way of life. . . . The profit that the Company had instead of going to the workers, they would donate it to the Church and to the Church Missionaries because that was tax-deductible money. (Tr 38-39.)

The Company contends, pursuant to the Third Circuit's reasoning in *Silverman's* and the Seventh Circuit's in *Katz*, that the mere mention of a particular religion by name transforms the statements into inflammatory slurs. (Br 19-20.) The *Silverman's* Court, however, had invective before it, which it described as a "bald, bigoted slur" and a "directly abusive remark." 656 F.2d at 59 n.10. Those descriptions cannot legitimately be applied to the language at issue in this case, which was far from abusive. While the priest in *Katz* may not have added gratuitous expletives to his references to Jews, his statements were part of a wealth of irrelevant and inappropriate racial and religious rhetoric that the Seventh Circuit has subsequently described as "central to the union campaign[.]" *State Bank of India v. NLRB*, 808 F.2d 526, 542 (1986) (discussing *Katz*). As shown above, there is no evidence in the instant case that the mention of Mormonism was anything but an isolated bolster to the Union's economic critique of the Company.

The Board also reasonably relied on the Company's failure to "offer any evidence of preelection tension[.]" (DCR 8), which some courts have held may create the possibility that even an isolated reference to race or

religion could be considered as “a sustained inflammatory [] appeal.” *See NLRB v. Heartshare Human Services of New York, Inc.*, 108 F.3d 467, 472 (2d Cir. 1997) (citing *NLRB v. Eurodrive, Inc.*, 724 F.2d 556, 559 (6th Cir. 1984)). In *Eurodrive*, for example, evidence was introduced that the workforce had a history of racial tension due, in part, to the firing of a white worker for racial harassment of the employer’s sole black employee. 724 F.2d at 557. This evidence was sufficient to transform a seemingly innocuous comment by a union organizer concerning “the white’s need for protection” into a “subtle, but deliberate attempt to exacerbate racial feelings among the employees[.]” *Id.* at 560. In contrast, the absence of a history of preelection racial tension in *Heartshare* was cited as a crucial factor in that court’s determination that a union flyer’s references to “slaves in the cotton field,” “apartheid,” and “racist[] empire” did not constitute a “sustained inflammatory racial appeal.” 108 F.3d at 472.

Here, as in *Heartshare*, there was no evidence of any preexisting tension for the Union to exacerbate with its comments. Thus, any argument that those comments were subtle appeals to prejudice would be unavailing. The Company has failed to show that the comments were inflammatory, either at face value or in context. Accordingly, the Board was well within its discretion to uphold the election results because here, unlike *Sewell*, the

election atmosphere could hardly be described as “so inflamed and tainted” as to make “a reasoned basis for choosing or rejecting a bargaining representative an impossibility.” 138 NLRB at 72.

3. The Board correctly placed the burden of persuasion on the Company

Completely neglected in the Company’s brief, is the bedrock principle that in representation election cases, a heavy burden of persuasion rests on the party seeking to set aside an election’s results. *See, e.g., NLRB v. Dixon Industries, Inc.*, 700 F.2d 595, 599 (10th Cir. 1983). As one of the Company’s own cases makes clear, the simple allegation of racial or religious remarks does not remove that substantial burden from the objecting party. *M&M Supermarkets*, 818 F.2d at 1573. Nonetheless, the Company persists in arguing that because an appeal to religious prejudice was alleged, the Board should have shifted the burden to the Union.

The Board and the circuit courts on review, however, have clarified that the standard emanating from the *Sewell* line of cases, and its accompanying requirement that a party making inflammatory appeals bears the burden of showing that its statements were truthful and germane, is not applicable unless a party’s racial or religious remarks are first found to be either inflammatory or at the core of the party’s campaign. *See, e.g., Case Farms*, 128 F.3d at 845, and cases cited. As the Fifth Circuit has made

clear, it is only upon such a showing that there is a “reversal of [the] burden of persuasion[.]” *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 925 (1976) (citing *NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436, 442 (5th Cir. 1975)).

Here, as shown, the Board reasonably found that the Company failed to demonstrate that the mere references to religion were sustained or inflammatory. Consistent with the above analysis, the Board properly found it unnecessary to consider whether the statements were either truthful or germane. (DCR 7, n.4.)

Despite its contrary protests, the Company’s cases do not stray from that analytical process. A careful reading shows that none of the cases cited by the Company shift the traditional burden from the party objecting to an election’s results, absent a finding of inflammatory appeals to racial or religious prejudice. The Company’s leading case involved a union officer calling the employer’s vice president a “stingy jew.” *Silverman’s*, 656 F.2d at 57. (See Br 16-19, 24-28, 31, 33.) In its analysis, the Third Circuit specifically found that there could be “no reason for the remark except to inflame and incite religious or racial tensions” before concluding, in the following sentence, that under *Sewell* “the burden of establishing the legitimacy of the remark shifted to the Union.” *Id.* at 58. In *Katz*, another case on which the Company primarily relies, (Br 19-20, 30) the court, in

rejecting the Board's certifying the election results without an evidentiary hearing, found that the objecting party's proffered evidence, detailed at p.16 above, established a prima facie case for setting the election aside, in part, through its allegations of specific "inflammatory religious and racial references[.]" 701 F.2d at 709. Similarly, in the Company's linchpin case of *M&M Supermarkets* (Br 28-32, 36-37), the Eleventh Circuit found that a series of references by a pro-union employee to the company's owners as "damned Jews[.]" "were so inflammatory and derogatory that they inflamed racial and religious tensions[.]" 818 F.2d at 1573.

The fact that these courts found inflammatory appeals to prejudice, as a predicate to a truth and relevancy analysis, comports with the analytical paradigms applied by circuits around the country. *See Case Farms*, 128 F.3d at 845-46 (citing cases from the Second, Fifth, Sixth and Seventh Circuits). Accordingly, the hearing officer and the Board in the instant case were correct to focus their analysis on whether the remarks at issue reflected a sustained appeal to prejudice or whether they were inflammatory. On those two points, the burden lay squarely on the Company, and as shown above, that burden was not carried.

CONCLUSION

For the foregoing reasons, the Board respectfully requests this Court to enter judgment denying the petition for review, and enforcing the Board's order in full.

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of long-settled law to simple and essentially undisputed facts. Nonetheless, because of the inherently serious nature of any allegation that impermissible religious appeals were injected into an organizing campaign, the Court may find oral argument to be helpful.

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