

Clark Equipment Company and United Steelworkers of America, AFL-CIO, Petitioner. Case 11-RC-4626

June 13, 1979

DECISION AND ORDER REMANDING PROCEEDING

BY MEMBERS JENKINS, PENELLO, AND TRUESDALE

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held February 22, 1979,¹ and the Acting Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Acting Regional Director's findings and recommendations only to the extent consistent herewith.

Petitioner filed two objections to the election held herein. The Acting Regional Director did not rule on Objection 1 but instead recommended that Objection 2 be sustained and that the election to set aside. For the reasons set forth below, we disagree with that recommendation and accordingly we remand this proceeding to the Regional Director for the further processing of Objection 1 as specified below.

Petitioner's Objection 2 alleged that representatives of the Employer made copies of the Board's notice of election containing the "Rights of Employees" section and showed these notices to individual employees. These notices allegedly had certain portions struck out and certain language written in which, according to Petitioner, was contrary "to the employees' rights."

Petitioner asserted that the document in question was shown to two or three employees by representatives of the Employer.² Specifically, according to Petitioner, on February 20, 1979, Production Control Manager Barry Johnson showed an employee a reproduced portion of the Board's notice of election containing the "Rights of Employees" section and discussed with the employees the handwritten marginal notations on the notice. Petitioner further contended that Section Manager Bill White showed another employee a photostatic copy of a portion of the

election notice (apparently the same portion as used by Johnson), which was written on and highlighted in yellow pencil.³ White allegedly read each of the handwritten notes to the employee and solicited the employee's comments. Finally, Petitioner contended that the same employee who allegedly was spoken to by White was also shown a reproduced copy of the same document by Foreman Dan Shaw.

The Employer admitted that Production Control Manager Johnson had a copy of a portion of the election notice with him when he had discussions with three employees. The Employer also stated that two portions of the election notice were highlighted by Johnson in yellow marking, and certain comments were handwritten on the notice. According to the Employer, these handwritten notations were used by Johnson to organize his thoughts. The Employer does not admit Petitioner's allegation that the handwritten comments were seen by the employees concerned.⁴

The Acting Regional Director noted that the Board "has long held that the use of the Board's official documents may convey the impression, albeit erroneously, that the Board has somehow allied itself with the party using it, and this type of conduct should not be permitted, least of all encouraged." The Acting Regional Director further stated that while some of the handwritten comments on the election notice were innocuous, the one which stated "promise by union to turn over cards to company after election" was clearly of importance to employees. Relying on the Board's decision in *Rebmar, Inc.*,⁵ which is discussed below, and noting that at least one supervisor had altered a reproduced portion of the Board's notice of election which was then used for electioneering purposes and seen by employees, the Acting Regional Director recommended that the election be set aside.

We do not agree with the Acting Regional Director that Petitioner's objection has merit even assuming, as Petitioner contends, that three employees were shown the notice and saw the handwritten comments on it. It is true, as indicated by the Acting Regional Director, that the Board is always concerned with any misuse of a Board document which might be viewed by the employees as an endorsement by the Board of a partisan view espoused by one of the parties to an election. Thus, in *Rebmar, supra*, a portion

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 104 for, and 158 against. Petitioner; there was 1 challenged ballot, an insufficient number to affect the results.

² The Acting Regional Director's report on objections indicates that the reproduced altered copy of the Board's notice was seen by only two employees. The Employer, who does not admit that any employees actually saw the document, states that three employees were involved in the alleged objectionable conduct.

³ The following phrases of the notice submitted by Petitioner and of the notice submitted by the Employer as described below were highlighted in yellow marking: "conduct which interfered with the rights of employees and may result in the setting aside of the election," and "promising or granting promotions, pay raises, or other benefits to influence an employee's vote by a party capable of carrying out such promises."

⁴ The only difference between the documents submitted by Petitioner and the Employer is the addition in Petitioner's submission of the phrase "Promise to minorities that they could have positions held by majorities." We consider this difference irrelevant in considering the issue here.

⁵ 173 NLRB 1434 (1968).

of the notice of election containing the "Rights of Employees" was reproduced by the union with a statement superimposed at the top stating, "The government protects your right to organize yourself in[to] a union." The other side of that handbill, which was apparently distributed to all the employees, contained an explanation in broad, generalized language of what a union is, how a union functions, and what a collective-bargaining contract is. Nowhere did the handbill refer to or mention the union by name. The Board in *Rebmar, supra*, sustained an objection to the election involving the use of this document and stated:

Our concern is not with the substance of the material added to the Board's official notice of election, but with the possible impact such a partisan message added to an official Board document, or copy thereof, might have on the freedom of choice of the voter To duplicate a part of the Board's official notice and then to add to it a personal partisan message that may be interpreted by the employee as an endorsement by the Board of one of the parties to the election, and thus have an impact on the employees' freedom of choice, is, we think, an undesirable use of Board documents designed for another purpose. That the Union's message in this case may be arguably innocuous and that there may have been at most a narrow or technical violation of the *Allied Electric Products*, 109 NLRB 1270, rule, is clearly irrelevant. Whether deliberate or unintentional, such action has a tendency to mislead, and we are of the opinion that the Board should guard against having its prestige put to such possible abuse.⁶

However, we note that in *A. Brandt Company, Inc.*,⁷ the Board considered further its holding in *Rebmar, supra*. In *Brandt, supra*, as here, an official Board document (in *Brandt*, a Regional Director's Supplemental Decision and Order) was reproduced, and contained underlined portions and marginal notations. Unlike the situation here, the reproduced document appears to have been distributed to all employees. Distinguishing the facts from *Rebmar, supra*, the Board in *Brandt* found that the "underlinings of portions of the reproduced decision and the marginal comments were obviously not part of the decision itself."⁸ Instead, the Board found that the comments and underlinings were readily identifiable as partisan comment, emanating from the union which had dis-

tributed the document, and could not be reasonably construed as part of the Regional Director's decision.⁹ Accordingly, the Board found the conduct in *Brandt* not objectionable.

In examining the facts herein, we find the Board's reasoning in *Brandt* particularly apt. Here, the notations and highlighting on the reproduced portion of the notice of election (whether the document used by the Employer be considered to have been the one submitted by it or Petitioner) are clearly discernible as additions made by the Employer rather than by the Board. These handwritten notations would not have been reasonably construed by the employees looking at them as originating with the Board, or as indicating Board approval of the Employer's position. Further, we note that the Board document, with the Employer's notations, was not distributed to the unit employees, but was seen by, at most, 3 of the 300 prospective voters. In such circumstances, we find no objectionable conduct established in Objection 2. We stress, however, as we did in *Monmouth Medical Center, supra*, that we "will continue to closely scrutinize a party's partisan use of Board documents, whether of a formal or merely informational nature, and will set aside an election where a party fails to disassociate adequately its own partisan remarks from the contents prepared by the Board."¹⁰ We do not find this to be such a case, however. Accordingly, for the above reasons, we conclude that Petitioner's Objection 2 is without merit and it is hereby overruled.

With respect to Petitioner's Objection 1, the Acting Regional Director found that it raised material and substantial issues which warranted a hearing if the Board disagreed with his recommended disposition of Objection 2. There were no exceptions to the Acting Regional Director's alternate recommendation with respect to Objection 1. Accordingly, the alternative recommendation to send Objection 1 to hearing is hereby adopted. The Acting Regional Director further recommended that, if a hearing were held on Objection 1, such hearing should be consolidated with a hearing already scheduled in Case 11-CA-8107. There were no exceptions to this recommendation, and we adopt it also.

ORDER

It is hereby ordered that Petitioner's Objection 2 be, and it hereby is, overruled.

IT IS FURTHER ORDERED that a hearing be held for

⁶ 173 NLRB 1434.

⁷ 199 NLRB 459 (1972).

⁸ 199 NLRB at 459.

⁹ See also *Monmouth Medical Center*, 234 NLRB 328 (1978), which recently applied the *Brandt* criteria to find unobjectionable certain markings, in handprinting and ink, which were placed by one of the parties to the election on a pamphlet prepared by the Board which contains information for voters in Board elections.

¹⁰ 234 NLRB at 329.

the purpose of receiving evidence to resolve the issues raised by Petitioner's Objection 1, and that such hearing be consolidated with any hearing in Case 11-CA-8107, and held before an administrative law judge to be designated by the chief administrative law judge. In the event that the unfair labor practice proceeding is disposed of prior to the hearing, a hearing officer will be duly designated to hear the representation matter.

IT IS FURTHER ORDERED that the administrative law judge, or hearing officer, designated for the purpose of conducting such hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition

of said objection. Within the time prescribed by the Board's Rules and Regulations, Series 8, as amended, any party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on each of the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the administrative law judge or the hearing officer.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 11 for the purpose of arranging such hearing and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.