

Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital and Patricia Ann Buffington, Petitioner, and Hospital Employees' Labor Program, Local 73 (HELP!)

Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital and Eloise Gohne, Petitioner and Hospital Employees' Labor Program, Local 73 (HELP!)

Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital and William Koulias, Petitioner and Hospital Employees' Labor Program, Local 73 (HELP!)

Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital, Employer-Petitioner and Hospital Employees' Labor Program, Local 73 (HELP!). Cases 13-RD-1250, 13-RD-1251, 13-RD-1252, 13-RM-1281, 13-RM-1282, and 13-RM-1283

September 30, 1982

SUPPLEMENTAL DECISION,¹
CERTIFICATION OF RESULTS OF
ELECTION, AND CERTIFICATIONS OF
REPRESENTATIVE

The National Labor Relations Board has considered objections to elections held on October 17, 1979,² and the Regional Director's Supplemental Report recommending disposition of the same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings and recommendations³ only to the extent consistent herewith.

We agree with the Regional Director's recommendation that the Union's objections in Cases 13-RD-1251 and 13-RM-1282 be overruled, and that a Certification of Results of Election be issued therein. For the reasons set forth below, however, we do not adopt the Regional Director's recom-

¹ The Board's original Decision in the instant case is reported at 251 NLRB 196 (1980).

² The elections were conducted pursuant to Stipulations for Certification Upon Consent Election. The tally in Cases 13-RD-1250 and 13-RM-1283 was 25 for and 23 against the Union; there was 1 challenged ballot, an insufficient number to affect the results. The tally in Cases 13-RC-1251 and 13-RM-1282 was 9 for and 11 against the Union. The tally in Cases 13-RD-1252 and 13-RM-1281 was 46 for and 38 against the Union.

³ In the absence of exceptions thereto, we adopt, *pro forma*, the Regional Director's recommendations to overrule the following Objections: the Employer's Objection 3(b) alleging that the Employer pushed for decertification, and Objection 4 alleging that the Union threatened and coerced employees; and the Union's Objections 1-4 alleging, respectively, threats or physical or financial harm, promises or grants of benefits, and improper inducement and stimulation of employees to file the decertification petition.

The Regional Director, in overruling the Employer's Objection 3(d) and the Union's Objection 6, regarding allegations of misrepresentations, correctly applied the law in effect at the time of his Decision. Since then the Board has decided to return to the *Shopping Kart* standards for judging misrepresentations. The objections of course are also without merit under this standard.

mendation that the Employer's Objection 3(a) in Cases 13-RD-1250 and 13-RM-1283, and 13-RD-1252 and 13-RM-1281 be sustained.

On or about September 13, 1979, approximately 1 month before the election, the Union distributed a leaflet, which read in part:

U.S. GOVERNMENT ISSUED COMPLAINT AGAINST RIVEREDGE

Riveredge's idea of negotiating a contract was—delay, offer nothing, delay, offer something at one meeting and then take it back at the next meeting, and on and on. It got so bad that the Regional Director of the National Labor Relations Board found reasonable cause that the Hospital had violated the law.

In fact, no complaint had issued against Riveredge. Rather, a charge filed in Case 13-CA-1877, alleging, *inter alia*, a unilateral change of wages, was settled with a nonadmission clause.

The Regional Director found that the leaflet was a clear misstatement of the Board's actions. Accordingly, relying on *Formco, Inc.*, 233 NLRB 61 (1977), and *Kinney Shoe Corporation*, 251 NLRB 498 (1978), he recommended setting aside the elections on the basis that the leaflet had injected the Board into the campaign and caused its neutrality to be impaired, and that the only credible response could come from the Board, which is unable to intervene in an election campaign to set the record straight.

If the Board were to continue to adhere to the principles of *Formco, Inc.*, the Regional Director's conclusion would have been correct. However, the Board in *Midland National Life Insurance Company*, 263 NLRB 127 (1982), overruled *General Knit of California, Inc.*, 239 NLRB 619 (1978); and *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962), and returned to the general rule of *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), that misrepresentations made during an election campaign are not grounds for setting aside the election. Therefore this is also an appropriate time to reexamine the previous exception to *Shopping Kart*, set forth in *Formco, Inc.*, that mischaracterizations of Board actions are treated differently than other misrepresentations in that they constituted objectionable conduct. We conclude that this exception is not justified. Accordingly, we have decided to overrule *Formco, Inc.*, and to treat mischaracterizations of Board actions in the same manner as other misrepresentations.

The Board, in *Formco, Inc.*, relied on the analysis set forth in *Dubie Clark Co., Inc.*, 209 NLRB 217 (1974), finding that a mischaracterization of a set-

tlement agreement potentially conveys the impression that the Board favors one party in the election campaign over the other party, thus impairing the Board's neutrality. In *Dubie-Clark Co.*, the Board for the first time set aside an election on the basis of misrepresentation of a Board action. In doing so, the Board analogized such a misrepresentation to the physical alteration of a Board document on the basis that any misuse of Board documents or the Board's processes for partisan advantage must be prohibited because this misrepresentation might place the Board's neutrality in question. We, however, are of the view that the Board's equation of a party's physical alteration of a Board document with the misrepresentation of a settlement agreement was erroneous. The two situations are dissimilar. The physical alteration involves the misuse of the Board's documents to secure an advantage⁴ while the misrepresentation merely involves a party's allegation that the Board has taken an action against the other party and is essentially the same as any other misrepresentation. In particular, we fail to see how an allegation that the Board has issued a complaint against the Employer when it, in fact, has not done so conveys to the employees the impression of Board bias in favor of one party in an election. Certainly a finding in favor of or against a party in a proceeding does not indicate that the Board has taken any view with respect to the course the employees should take in an election campaign. Otherwise the Board arguably should preclude even truthful statements of Board actions in order to preserve its neutrality. If truthful statements concerning Board action do not indicate that the Board favors one choice over another then misrepresentations as to Board action cannot have that effect. In other words, to misrepresent that the Board, through the General Counsel, had administratively determined that there was sufficient evidence to warrant a conclusion that a party had violated the Act, when, in fact, no such determination had been made, no more shows bias or prejudice on the part of the Board than if such action had been taken. In either instance the Board's neutrality is not impugned.

Further, there are crucial and material differences between the alteration of a Board document and a party's misstatement of Board action. In the former situation a party proffers what it claims to be an official statement of Board action. It is the Board which purports to speak, through the document. In the latter case, the one presented here, we

⁴ In *Midland National Life Insurance Company*, *supra*, 263 NLRB 127, we stated that we will continue to set aside elections in cases where an official Board document has been altered in such a way as to indicate an endorsement by the Board of a party to the election.

face only one party's representation of the Board's action. The Board's actions speak for themselves, and will show up any misrepresentation for what it is. Thus, we find that the Board's perception that its neutrality was affected by misstatements as to Board actions, as set forth in *Dubie Clark* and relied on in *Formco* and *Kinney Shoe*, as well as other cases, was incorrect.

Consequently, we see no sound reason why misrepresentations⁵ of Board actions should be on their face objectionable or be treated differently than other misrepresentations. We therefore overrule *Formco, Inc.*, and *Kinney Shoe Corporation*, and shall treat such misrepresentations the same as other misrepresentations.⁶

CERTIFICATION OF RESULTS IN CASES 13-RD-1251 AND 13-RM-1282

It is hereby certified that a majority of the valid ballots have not been cast for Hospital Employees' Labor Program Local 73 (HELP!), and that said labor organization is not the exclusive representative of all the employees in the unit involved in the above designated cases, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

CERTIFICATION OF REPRESENTATIVE IN CASES 13-RD- 1250 AND 13-RM-1283

It is hereby certified that a majority of the valid ballots have been cast for Hospital Employees' Labor Program Local 73 (HELP!) and that pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

⁵ The concern, as stated in *Formco, Inc.*, and *Dubie-Clark Co.*, that such misrepresentations might discourage parties from voluntarily entering into settlement agreements is nothing more than unwarranted speculation.

⁶ Inasmuch as we are finding misrepresentations of the Board's processes not to be objectionable, there ordinarily would be no need for us specifically to comment on the Board's theory in *Formco, Inc.*, and *Kinney Shoe Corporation* that the only credible response to misrepresentations of this sort can come from the Board. Because we are overruling those cases, however, we believe it appropriate to expressly note that we do not subscribe to that theory. There is nothing unique about the Board such that only it can correct misrepresentations concerning its actions. Thus, there is no reason why the affected party cannot set the record straight in exactly the same manner and to exactly the same extent as it can respond to any other misrepresentation. Therefore, in applying the Board's standards regarding misrepresentations, as set forth in *Midland National Life Insurance Company*, to the instant case, we find the Union's leaflet not to be objectionable. Accordingly, we overrule the Employer's objections and shall issue a Certification of Representative in Cases 13-RD-1250 and 13-RM-1283, and 13-RD-1252 and 13-RM-1281.

Service and maintenance employees including only EKG/EST Technician, P.B.X. operators, receptionists, medical transcriptionists, medical library clerk, unit clerk, head cook, dietary aides, salad technician, relief cooks, housekeeping aides, floor care workers, laundry coordinator, painters, carpenter, maintenance workers, and medical technicians employed by the Employer at its facility located at 8311 West Roosevelt Road, Forest Park, Illinois 60130; but excluding all other employees, guards and supervisors as defined in the Act, as amended.

**CERTIFICATION OF
REPRESENTATIVE IN CASES 13-RD-
1252 AND 13-RM-1281**

It is hereby certified that a majority of the valid ballots have been cast for Hospital Employees' Labor Program Local 73 (HELP!) and that, pursuant to Section 9(a) of the Act the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

Technical employees including only audio-visual technician, mental health technicians, mental health counselors, mental health team leaders, adolescent counselors, alcoholism counselors, activity therapists, licensed practical nurses, laboratory technician and certified occupational therapy assistants employed by the Employer at its facility located at 8311 West Roosevelt Road, Forest Park, Illinois 60130; but excluding all other employees, supervisors, and guards as defined in the Act, as amended.

MEMBERS FANNING and JENKINS, dissenting:

In this case, the Union distributed a leaflet which stated, falsely, that "the U.S. GOVERNMENT ISSUED COMPLAINT AGAINST RIVER-EDGE" and that the Employer's bargaining tactics were "so bad that the Regional Director of the National Labor Relations Board found reasonable cause that the Hospital had violated the law." The fact is that several charges were filed, including allegations of surface bargaining, and all were dismissed or withdrawn except one involving a unilateral change of wages. That allegation was settled informally without a complaint having issued but with a nonadmission clause.

In *Mallory Capacitor Company*, 161 NLRB 1510 (1966), a Board panel held that a union committed objectionable conduct, warranting the setting aside of an election, when it distributed to employees al-

tered copies of the complaint the Regional Director had issued against the employer which made it appear that the Regional Director had rendered a final judgment that the employer had engaged in the unfair labor practices alleged. The Board's rationale for finding the union's conduct objectionable was that the altered document was "reasonably calculated to mislead employees into believing that the Board has judged the Employer to have violated Federal law whereas, in truth, it has only made allegations which have yet to be proved." 161 NLRB at 1512. Then, in *Dubie-Clark Co., Incorporated*, 209 NLRB 217 (1974), the full Board, Member Penello dissenting, held that the *Mallory* principle applies not only to misuse of a Board document by alteration, but also to "any substantial mischaracterization or misuse of such a document for partisan election purposes." 209 NLRB at 218.

Now, in the instant case, the majority had breathed life into the previously rejected distinction that Member Penello attempted to draw. Thus, they would condemn any misrepresentation of Board proceedings accomplished by the use of an altered Board document but condone the same misrepresentation when made on a separate sheet of paper, in the form of a fraudulent misstatement of Board action. Such a distinction represents either the most superficial and formalistic kind of legal thinking or a slavish adherence to the recently current slogan, "the medium is the message." In fact, the distinction is a trap that the majority laid for itself, for it is the logical extension of the specious distinction it reasserted in *Midland National Life Insurance Company*, 263 NLRB 127 (1982), between forgery and all other kinds of fraud.

In its zeal for finding reasons to decontrol our election process, the majority gives only superficial consideration to the reasons for assuring truthfulness in reporting Board actions involving the parties competing for the employees' votes. Speaking from the vantage point of experts in Board procedure, the majority asserts that the Board's action with respect to a party in a proceeding "does not indicate that the Board has taken any view with respect to the course employees should take in an election campaign." This statement is correct, technically. But no amount of rationalizing can gainsay the powerful effect of a report that one of the parties is a proven violator of the Act. On the other hand, it is the height of sophistry to suggest, as the majority does, that under the *Dubie-Clark* analysis, "the Board arguably should preclude even truthful statements of Board actions in order to preserve its neutrality."

As we stated in *Kinney Shoe Corporation*, 251 NLRB 498 (1978):

A misrepresentation of this sort, however, is not a misrepresentation of the actions of any party, but, rather, a misrepresentation of the actions of the Board. Once either party has called the Board's actions into question, the only credible response can come from the Board. However, the Board cannot intervene during an election campaign to set the record straight after its own documents or processes have been misrepresented.

Thus the onus that lies on the proven violator is justly earned; the onus that is placed falsely is justly turned against the perpetrator of the fraud.

Another consideration to which the majority gives but nodding attention is the discouraging effect upon voluntary settlements of unfair labor practice charges if parties are permitted to mischaracterize such settlements as official findings of unlawful conduct. While the majority glibly dismisses

the adverse effect of its new permissiveness as "nothing more than unwarranted speculation," we continue to be cautious over the prospect that unions and employers will be more reluctant to enter into settlement agreements knowing that such agreements may provide another party with an incentive to publish with impunity the kind of unfounded and unfair statement that was made in the instant case.

In short, the majority has compounded the error it committed in *Midland National Life Insurance Company, supra*, opening even wider the door for chicanery as a campaign technique. Therefore, we dissent.⁷

⁷ As we would affirm the Regional Director in sustaining Employer's Objection 3(a) relating to the Union's misrepresentation of a settlement agreement, and would set aside the election on that basis, we find it unnecessary to pass on any other issues.