Zartic, Inc. *and* International Union of Electronic, Electrical, Technical, Salaried, Machine and Furniture Workers, IUE, AFL–CIO, Petitioner. Case 10–RC–14199

October 31, 1994

SUPPLEMENTAL DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

The National Labor Relations Board, by a three-member panel, has considered the Employer's objection to an election held February 7, 1992, and the report (attached as an appendix) recommending its disposition. The election was conducted pursuant to a Decision and Direction of Election. The revised tally of ballots of May 27, 1992, shows 279 for and 244 against the Petitioner, with 21 challenged ballots, a number insufficient to affect the results of the election. On December 3, 1992, the Board, by an unpublished decision, affirmed the Regional Director's determination overruling the Employer's several objections to the election, with the exception of Objection 1, which was remanded to the Regional Director for a hearing. The hearing was held on February 3 and 4, 1993, and the attached report of the hearing, recommending the overruling of Objection 1 and certification of the Union, issued on September 1, 1993. The Employer filed exceptions and a supporting brief, and the Union filed a brief in opposition to the exceptions.

The Board has reviewed the record in light of the exceptions and briefs, and adopts the findings and recommendations contained in the report only to the extent consistent with this decision.

The issue posed by the Employer's Objection 1 is whether the Union's use of an audiotape, assertedly containing derogatory statements about Hispanic employees attributed to a management official, and/or two leaflets, which assertedly linked the Employer to the Ku Klux Klan, constituted a sustained, irrelevant, inflammatory appeal to the ethnic sentiments of the Employer's Hispanic employees which so interfered with election conditions that the election must be set aside. As fully set forth below, we find this conduct objectionable, and we will direct a second election.

As a preliminary matter, we note that the hearing officer who conducted the hearing subsequently became unavailable to write the report. Accordingly, an attorney in the Regional Office reviewed the record and the parties' posthearing briefs, and produced the attached report (the Board Attorney's Report, BAR). In their briefs to the Board both the Employer and the Union point out that the credibility resolutions contained in the BAR, not based on witness demeanor, are open to broad scrutiny by the Board. On review of the record, it is apparent that a number of significant factual issues, including questions involving credibility, either were not resolved in the BAR or were resolved in a manner lacking adequate support in the record. Accordingly, in setting forth the facts relevant to our determination, we have carefully evaluated the record in its entirety and, where appropriate, made credibility resolutions consistent with that evaluation. See, e.g., *El Rancho Market*, 235 NLRB 468, 470 (1978), enfd. mem. 603 F.2d 223 (9th Cir. 1979); cf. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957); *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

Facts

The Union is seeking to represent a single bargaining unit of production and maintenance employees in the Employer's two poultry-processing plants—one in East Rome, the other in West Rome, Georgia. There are about 200 employees in the East Rome plant and about 400 in the West Rome plant. There is a large percentage of Hispanic employees among those in the unit sought by the Union: between 75 and 90 percent of the employee complement at the East Rome plant and about 50 percent at the West Rome facility. The majority of the Hispanic employees are recent immigrants; most cannot read or speak English. The Union's organizing campaign began in late fall 1991 and culminated in a Board election on February 7, 1992. The Union prevailed in the final ballot tally, 279 votes to 244.

In late November 1991, employee Chad Peck, who worked at the East Rome plant, secretly audiotaped a conversation he had with Steven Mayes, a management official.[1] On the tape Mayes recounts a conversation he had with Francois Gaulin, who formerly had been plant manager at the East Rome facility and who in fall 1991 was a special projects manager assigned to that plant. According to Mayes, Gaulin said, ''[Y]ou got to push these people. It's hard for these people to sleep on the floor of a trailer that ain't got no damn electricity. They're the closest things to animals they could be. He said, you've got to treat them that way.'' Peck told employees and union officials about the tape. It is apparent that in describing it he claimed that ''these people'' was a reference to the Employer's Hispanic employees.

In early to mid-January 1992, the Union, and especially Union Organizer Rudy Rodriguez, became interested in the tape. Rodriguez was assigned to the organizing campaign in early January and given responsibility for the East Rome plant. He obtained a copy

[1] We agree with the Board attorney that at the very least Mayes was an agent of the Employer.

of the tape from Peck[2] and played it for employees at several union meetings. It is unnecessary to determine the exact details of the Union's use of the tape, such as the number of union meetings at which it was played and/or discussed, the number of employees attending, or the specific manner in which the Union represented the contents of the tape to the employees. Overall, it is clear on this record, and sufficient for our evaluation of this case, that the Union used the tape repeatedly as an organizing tool in the weeks immediately preceding the election.

On January 29, 1992, about a week before the election, the Employer held a meeting for a group of about 100 East Rome employees to address its positions regarding the campaign. The vast majority of the employees attending were Hispanic. Also present were Gaulin, Thomas Owens, the plant manager of the East Rome plant, Walter Raybun, the Employer's director of human resources, and a Spanish-language translator. A videotape was shown in which three employees of the Employer's nearby Cedartown facility described their negative experiences with union representation during the 1980s. After the videotape, a question-and-answer session was held. When employee Mark Holcomb raised questions about the Peck audiotape, a commotion ensued. Holcomb first asked about a tape in which, as he described it, *Owens* stated that Hispanics lived like animals and should be treated like animals. At this, several employees in the meeting room left their seats and, visibly upset, moved toward the stage where Owens was sitting. Holcomb repeated the question several times, Owens vociferously denied what Holcomb was saying, and more employees moved toward the stage, knocking chairs over. Then Holcomb stated that it was *Gaulin* who had said these things about Hispanics on the tape, and the employees turned toward Gaulin, who was standing to one side of the room. Gaulin also denied what Holcomb was saying, and Holcomb repeated the accusation. Raybun, concerned about possible violence, ordered Holcomb to leave the room.[3] Owens then ordered everyone except the employees to leave the room, including Gaulin, and the disturbance ended.[4]

In late January, apparently after the January 29 meeting, the Union made two leaflets available to employees. One was a photocopy of the first page of a 1981 newspaper article concerning the Ku Klux Klan's participation in a strike against the Employer at the Cedartown plant in 1981. The title of the article stated ''Money Fueled Klan Scheme During Strike.'' About one-half of the portion of the article reproduced consisted of a photograph of Klansmen on the picket line. The Union distributed this leaflet at union meetings. Copies eventually made their way to both of the Employer's facilities: they were found in the parking lots, breakrooms, and plant areas. At one union meeting where the leaflet was made available, Union Organizer Rodriguez told employees that the Employer gave money to the KKK in Cedartown.[5]

The other leaflet was a photocopy of another newspaper article from 1981 about an Hispanic employee at the Cedartown facility who was mysteriously killed. About one-half of this reproduced, partial article consisted of a photograph of the employee's father grieving at his son's gravesite. This leaflet was made available to the employees at the Union's office in Rome and was distributed at at least one union meeting attended by 60 employees. At that meeting, Rodriguez told the group that the Cedartown employee referred to in the article had been killed by the KKK.[6]

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[2] In light of the use of this tape by Rodriguez, who was a union agent, we find it unnecessary to resolve whether Peck was also an agent of the Union.

[3] As with employee Peck, we find it unnecessary to resolve whether Holcomb was an agent of the Union, in view of our disposition of this case.

[4] The Board attorney did not determine what in fact occurred at the January 29 meeting. The credited rendition above is based on Raybun's testimony, which the Board attorney neither credited nor discredited. Raybun's testimony is substantially corroborated by that of Owens and Gaulin. We do not agree with the Board attorney's apparent discrediting of Owen's and Gaulin's testimony. Testimonial inconsistencies concerning trivial, unrelated factual matters are insufficient to discredit Owens with regard to the January 29 incident. See BAR, fn. 50. In addition, on our review of the P. Exh. 1, a very brief, general affidavit given by Gaulin to the Employer on February 27, 1992, we do not find it to be necessarily inconsistent with Gaulin's testimony concerning the January 29 incident, and therefore an inadequate ground to discredit him. See BAR, fn. 47. To the extent that the testimony of Holcomb may be perceived as inconsistent with Raybun's concerning the January 29 meeting, we discredit Holcomb. Holcomb testified that he, a unit employee, had a seat on the stage with management officials Owens and Raybun for the January 29 meeting—a claim that is patently incredible. In addition, his testimony about what he said at the meeting is in conflict not only with the testimony of the three management officials above but also with his own affidavit given to the Board and with the testimony of Union Representative Gary Tucker regarding what Holcomb afterward told him about the meeting.

[5] The finding that Rodriguez made this statement is based on the undisputed testimony of employee Paulette Kirby, whom the Board attorney apparently discredited because her testimony was given in response to leading questions. See BAR, fn. 37. We reject the Board attorney's credibility resolution. The Union raised no objection to the leading nature of the Employer's attorney's questions to her. The meaning of her testimony is clear. Most significant, she affirmatively identified Rodriguez, who was seated at the Union's table at the hearing, as the source of the statement; in Rodriguez' subsequent testimony, he did not deny that he made the statement. Overall, Kirby's testimony on this matter is reliable and credited.

[6] The finding that this statement was made by Rodriguez is based on the undisputed testimony of former employee Letitia Tello, who was working for the Employer at the time of the Union's campaign. The Board attorney neither credited nor discredited her testimony, but noted that the Employer's attorney ''refreshed her memory'' concerning Rodriguez' remark with an affidavit she had previously given. This is an insufficient basis for either discrediting her testimony or giving it little probative weight. In addition, as with employee Kirby's testimony above, Rodriguez had an opportunity in his subsequent testimony to deny that he made the statement, and he did

The record makes clear that in Cedartown in 1981 the KKK picketed the Employer's plant demanding that all the Hispanic employees be discharged. The Klansmen marched through the town and around the plant and burned a cross. They carried signs which insisted that the Employer fire the illegal aliens and send the Mexicans back to Mexico. The Employer did not provide any financial support to the Klan; rather, it obtained an injunction restraining the Klan's activities. After the injunction against the KKK, a union—not the IUE—filed a petition to represent the Cedartown employees and engaged in picketing at the Cedartown facility. With regard to the dead Cedartown employee referred to in the Union's second flyer, there were allegations at the time of his death that the KKK had murdered him. Some of the Hispanic employees who had worked at the Cedartown plant in 1981 were working at the Employer's West Rome facility during the Union's campaign, and other Hispanic employees at the Rome plants had relatives who had worked at Cedartown in 1981. The record further establishes that the Hispanic employees at the Rome plants generally were apprehensive and fearful of the KKK in light of the Cedartown history. There is no evidence that the Employer raised the KKK's picketing and related activities in Cedartown in 1981 during the Union's campaign at the two Rome facilities.

Analysis

The seminal case for analysis of the Employer's Objection 1 is *Sewell Mfg. Co*., 138 NLRB 66 (1962). In *Beatrice Grocery Products*, 287 NLRB 302 (1987), the Board reaffirmed the *Sewell* standard:

> [In *Sewell*] the Board held that it would set aside elections when a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals. 138 NLRB at 72. *Sewell* itself involved a party's sustained course of conduct, deliberate and calculated in intensity, to appeal to racial prejudice. The Board in *Sewell* distinguished such conduct from isolated, casual, prejudicial remarks.

Beatrice, supra at 302. Although we found no basis to set aside the election on *Sewell* grounds in *Beatrice*, we indicated generally the kind of conduct which would be unacceptable. Thus, when a party makes ''racial, ethnic, or religious references as part of an inflammatory campaign theme,'' or the party brings up ''references to racial, ethnic, or religious groups in a totally gratuitous way, unconnected to any employee concerns, we would not hesitate to set aside the election.'' *Beatrice*, supra at 303. More recently, in *KI (USA) Corp*., 309 NLRB 1063 (1992), we established an analytical approach for *Sewell* issues: we will assess the ''intent'' of the party accused of the relevant misconduct as well as its ''likely effect on the unit employees in question,'' for the purpose of ascertaining ''whether this conduct so clouded the election atmosphere as to require the election to be set aside.'' *KI (USA)*, supra at 1064, 1065.

The Union's campaign began in late fall 1991, and through the end of the year it is apparent that neither the Employer nor the Union raised racial or ethnic issues of any significance. However, during January 1992, in the final weeks before the February 7 election, certain matters implicating the ethnic concerns of the Employer's Hispanic employees—a significant majority of the voting unit—were pressed into service by the Union. With regard to the Peck audiotape, we will *assume*, without it being necessary to *find*, that the Union's repeated use of the tape at union meetings for campaign purposes was a legitimate exercise under *Sewell*. However, even with the legitimacy of this conduct assumed, the tape's inflammatory content, especially when it was recounted as referring to the Employer's Hispanic employees, is undeniable. The use of the Peck tape created a volatile atmosphere in the campaign. The disturbance at the Employer's January 29 meeting is significant evidence of this volatility.

Within this charged environment, in late January the Union distributed and otherwise made available the two leaflets described above. Both were purposefully related to the KKK—an entity which in this case not only presented its usual well-known reputation for bigotry, but was also of particular significance to the Hispanic employees in light of the events 10 years earlier at the Cedartown plant. The Union clearly connected the leaflet concerning the dead Cedartown employee with the KKK by reviving an old allegation. It is also apparent that Union Organizer Rodriguez attempted to connect the Employer directly with the KKK at a union meeting through an unsupported statement concerning financial assistance. However, the leaflets are more significant in themselves—each with a relatively large photograph designed for emotional impact, and each accompanied by only a *partial* newspaper article, indicating that the article itself was unimportant. In addition, both flyers drew the Employer into the Union's message at least implicitly by reference to past occurrences at its Cedartown plant.

The Union defends its use of the ''Cedartown employee'' leaflet by claiming simply, and without more, that it had ''historical value.'' The Union explains that the ''KKK picketing'' leaflet was used because it had heard that the Employer was misleading the employees that the IUE, rather than another union, was involved in the 1981 Cedartown picketing. According to the Union, the flyer demonstrated that a union other than the IUE participated in that dispute. Although it is true

not do it. In the circumstances, Tello's testimony on this matter is reliable and credited.

that the IUE was not involved in the 1981 situation at Cedartown, the information reproduced on the leaflet does not identify any particular union and therefore has no logical connection to the Union's averred explanation. We find the Union's asserted justifications for the flyers to be lacking any foundation, and therefore suggest some other intent. Taking account of all the circumstances, we infer that the Union's intent was to exploit the ethnic fears of the Hispanic employees by making a visceral connection between the KKK and working conditions. In our view, the Union's circulation of the two leaflets constituted a sustained appeal to the ethnic sensibilities of the Employer's Hispanic employees which was inflammatory, gratuitous, and irrelevant to any bona fide campaign issue.

With regard to the effect of the Union's conduct, it may be that in other circumstances the Union's use of the leaflets would have been merely ''stupid and lacking in taste,'' as the Board attorney characterized it. However, in the volatile atmosphere already existing in this campaign because of the Union's use of the Peck tape as an issue, the Union's conduct with regard to the two leaflets, including contemporaneous comments by Rodriguez, pushed the organizing campaign past the limits which *Sewell* permits. We conclude that this misconduct ''so clouded the election atmosphere'' that laboratory conditions were destroyed and a fair election could not be held. Accordingly, we will direct a new election.

[Direction of Second Election omitted from publication.]

APPENDIX

On January 8, 1992, a Decision and Direction of Election issued in this case. Pursuant thereto, an election was conducted among the employees in the appropriate unit on February 7, 1992.[1] Subsequent to the balloting, the parties were provided a tally of ballots showing 260 valid votes for and 219 valid votes against the Petitioner. There were 68 challenged ballots which affected the results of the election. Both parties filed timely objections to the election. On March 26, 1992, a Supplemental Decision and Order issued based on the agreement of the parties that 46 employees whose votes were challenged were, indeed, eligible to vote.[2]

The Employer filed a request for review of the supplemental decision because the Regional Director did not address the parties' objections to the election.[3] The Petitioner filed an opposition to Employer's request for review. On June 11, 1992, a Second Supplemental Decision and Certification of Representative issued.[4] A revised tally had been given to the parties on May 27, 1992, showing 279 valid votes for and 244 valid votes against the Petitioner. The remaining 21 challenged ballots did not affect the results of the elections. The Regional Director overruled the Employer's objections in their entirety.[5]

On July 7, 1992, the Employer mailed its ''Exception to the Decision the Regional Director'' and a supporting brief.[6] The Petitioner then filed an answering brief to the Employee's exceptions. Apparently the brief was filed late because the Employer filed a brief in opposition to the Union's motion for permission for late filing of answering brief. On December 3, 1992, the Board issued a Decision and Order Remanding Proceeding for Hearing, directing hearing solely on the issues raised by Employer's Objection 1. On January 14, 1993, a notice of hearing objection issued, and, on February 3 and 4, 1993, a hearing was held before a duly designated hearing officer. On July 2, 1993, an order issued assigning the case for decision to a different Board agent due to the unavailability of the hearing officer.[7] I have inherited that role. I have thus read the transcript, read the written exhibits in their English versions only, viewed videotapes submitted as evidence, and have listened to the Peck/Mayes audiotape which is discussed, infra. I have considered the parties' briefs where pertinent to the issue involved herein.[8]

I have considered the entire record with great care.[9] My findings herein are based on my evaluation of the proffered testimony, having had, of course, no occasion to observe the witnesses as they testified. I made determinations of credibility, where required, based on my analysis of the partisan interests of the witnesses, guarded or indirect answers,

[1] ''All full-time and regular part-time production and maintenance employees, including quality control employees employed by the Employer at its Rome, Georgia facilities, excluding office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act'' was the unit found appropriate.

[2] Resolution of the remaining challenged ballots, except that of Supervisor Rhonda Rayes, agreed to be excluded, and of the objections was held in abeyance pending a count of these ballots, albeit a conditional hearing was directed on the challenged ballots.

[3] The formal papers before me contain an incomplete copy of the request for review, there being no exhibit attached thereto as averred in said request.

[4] This Supplemental Decision avers the denial of the aforementioned request for review on May 14, 1992. A copy of this document is not a part of this record.

[5] The Petitioner, now the winner of the election, had its objections declared moot.

[6] Again materials allegedly appended to the Employer's documents are not a part of the formal document in the paper presented to me. Cf. *Hubert Halperin Distributing Corp.*, 281 NLRB No. 1 (1986) (not reported in Board volumes).

[7] A copy of this order is made a part of the record as Board Exhibit.

[8] While certain hyperbole is expected in brief, especially where argument is had, I was surprised that the statements of fact in the Employer's brief grossly misrepresented even the evidence cited therein. This did little to persuade me of the correctness of the Employer's representation of evidence. Specifics may be referred to hereinafter as necessary and as bearing on credibility issues before me. To insure that my concerns about the brief did not overly affect my findings, I note that I had read the transcript prior to reading the brief, reaching certain conclusions based on prior research. Following reading the brief, and prior to reaching final conclusions, I re-read the transcript to see if my original reading was correct. Thereafter, as I wrote, and as I came across a problem area, I re-read those parts of the transcript cited by counsel to ascertain again the facts as opposed to statements that were untrue.

[9] The parties' motion to correct the transcript is granted, and the motion is made part of the record as Bd. Exh. 4.

conclusional testimony as distinguished from fact, self-serving answers, answers to leading questions on direct examination, testimony unprompted by a question, general memory for detail, ability to comprehend questions and answers thereto, and patent incredibility of answers.

Where deemed necessary, I shall state my specific findings, and reasons therefor. I may not allude at all to testimony I deem entirely unworthy of belief. I note further that the hearing was occasioned by the Employer's objections and its exceptions to the Board opposing the Regional Director's findings. It is well established that the burden is on the objecting party to show that the election was unfair.[10] Thus, I turn now to the evidence presented on the objection which objection I also set forth now for the purpose of style.

> Objection 1: The Petitioner, through its agents, representatives or employees, appealed to the racial prejudice and/or fear of racial prejudice of Z-Bird's employees thereby interfering with the rights of said employees to freely choose a bargaining representative and destroying the laboratory conditions necessary for a valid election.

I. INTRODUCTION OF CASE

The Employer basically contends that four matters arguably establish its stated claim, above. The first of these is the dissemination by the Petitioner of a leaflet, received as Employer's Exhibit 1. The second argument concerns the dissemination of a document received as Employer's Exhibit 2. A third element involved an audiotape recorded by employee Chad Peck and allegedly used by the Petitioner in its campaign herein, and, finally, a ''disruption'' of a meeting held by the Employer by employee Mark Holcomb, wherein he allegedly invited racial and/or ethnic strife between Hispanic employees and the Employer. The Employer contends that Peck and Holcomb are agents of the Petitioner.[11] The Employer also argues that, should one or more of its specific assertions fail to be sufficient to set the election aside, all must be looked at as a body to determine whether the Petitioner's campaign was totally tainted by race or ethnic considerations.[12]

Prior to a discussion of the issues individually and collectively, I find it more logical to discuss first the legal authorities I deem applicable and controlling to these matters. Thereafter, I shall set forth the evidence proffered by the parties, following which I shall note my conclusions as to the effect of the law on these facts.

II. THE LAW

A. *Agency*

The status of members of union organizing committees or employee solicitors of union support, including cards and petitions, has had a mixed history when it comes to establishing agency thereof. The Board has held that members of an in-plant organizing committee are not, simply by virtue of such membership, agents of ''their'' union for the purposes of making threats or statements. Further, card solicitation also does not add stature to such employees. The in-plant organizing committee must be shown itself to be an agent of the union before the conduct of the committee members will be impacted to the union.[13] To a seeming contrary result, the Board has found that ''well-known'' prounion employees, who were the union's sole link to the employees and who were used as conduits by the union were held out as agents by the union.[14] Further, the Board has found that in the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of their statements to employees about purported union policies.[15]

The Board, in discussing the agency status of a vocal and active union adherent who solicited cards, set up meetings, and served as the union's election observer, stated in a later case that these activities were a manifestation to employees of agency status broad enough to render the employee a ''general agent.'' Although the Board found a possible ''implied manifestation'' of agency status, it found no implied ratification of the employees' actions absent union awareness thereof. *Bristol*, and *Davlan* supra, were distinguished by the Board.[16]

Apparent authority, says the Board, is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. The principal must intend to cause the third party to believe the agent is authorized to act for him or the principal should realize that its conduct is likely to create such a belief. Absent these criteria being met, a principal can affirm the alleged agent's actions subsequent thereto by its manifestation to treat the act as its own or by conduct justifiable only if the principal elected to ratify the act as its own, such as a failure to repudiate.[17]

In cases involving in-plant committees and card solicitors, the Board has looked at the campaign's structure. Thus, much emphasis as a manifestation of agency is on the lack union presence in the campaign. When the union has shown a strong and regular presence in the campaign, has been available to employees to speak to its representatives on behalf of the Union, and has held frequent meetings at which

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[10] E.g., *Bausch & Lomb, Inc.*, 185 NLRB 262 fn. 4 (1970).

[11] The Employer's ''statement of facts'' that Peck was an employee of the Petitioner is not even supported by its own citations to the record in its brief. For example, the Employer cites Tr. 341 to prove Peck to be an employee of the Petitioner apparently on the following testimony:

> Q. Were you an employee of the union?
>
> A. No.

[12] There exists ghost or trace issues wherein names of supporters of the Petitioner who may or may not have been involved in issues related to the objection came forward. To the extent that they are not discussed herein, I have found that the Employer has failed to provide evidence worthy of discussion with regard to such allegations.

[13] *Cambridge Wire Cloth Co.*, 256 NLRB 1135 (1981). See also *Benjamin Coal Co.*, 294 NLRB 572 (1989); *Pierce Corp.*, 288 NLRB 97 (1988).

[14] *Bristol Textile Co.*, 277 NLRB 1637 (1986).

[15] *Davlan Engineering*, 283 NLRB 803 (1987).

[16] *United Builders Supply Co.*, 287 NLRB 1364 (1988). See also *Advance Products Corp.*, 304 NLRB 436 (1991).

[17] *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988). See also *Allegany Aggregates, Inc.*, 311 NLRB 1165 (1993). Compare *Bio-Medical Applications of Puerto Rico*, 269 NLRB 827 (1984).

union principals themselves were available and in control, the Board has found no agency on the part of individuals, notwithstanding their strong, open, and vocal union support and activity.[18]

B. *Appeals to Prejudice*

1. Union responsibilities

In an early case, a union representative was alleged to have stated at meeting that, if the petitioner did not win the election, the employer would lay off all ''colored employees,'' thus, the only way to spare their jobs was for them to vote for the union. The Board found such a statement to be campaign rhetoric which the employees could evaluate as an accusation. According to the Board, a layoff was without the power of the union to accomplish.[19] Some few years following this decision came the *Sewell* case, which both parties agree contains the controlling principles of law for this case.[20]

In *Sewell*, the Board acknowledged that some appeals to certain prejudices of one kind or another were inevitable parts of union campaigns. Thus, no per se rule was to be enunciated. The Board did state that appeals to racial prejudice on matters unrelated to election issues, or to union activities are not to be considered mere ''prattle'' ''puffing.'' The Board said such had no place in a union campaign. However, said the Board, so long as a party limits itself to setting forth *truthfully* the other party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, the Board will set aside elections on that basis. The Board placed the burden on the party making use of a racial message to establish that it was truthful and germane to the campaign. Any doubt as to whether the total conduct of such a party lays within the prescribed bounds of conduct is to be resolved against that party.

In later cases, the Board undertook to explain the *Sewell* findings. Thus, it has stated that *Sewell* stands for the proposition that the Board will not tolerate racial propaganda unless such meets certain conditions. Such propaganda must be truthful, temperate, and germane to a party's position, and the party must not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals.[21] Otherwise stated in later proceedings, a party is free to appeal to racial pride but cannot use campaign arguments that are inflammatory in character, setting race against race, or appealing to animosity rather than to consideration of economic and social conditions and circumstances and of possible actions in response to them.[22]

Yet later, the Board cited *Sewell* as being applicable only in those circumstances where it is determined that the ''appeals and arguments can have no purpose except to inflame the racial feeling of voters in the election.''[23] In this case, rumor abounded that, if the black employees did not stay together as a group and the union lost, all the black employees would be discharged. The Board found layoffs to be of utmost concern to employees and the union's viewpoint on the possible impact of layoffs relevant to the campaign. Thus, appeals to racial pride, racially concerted activities and racial solidarity are lawful concerted activities. A further refinement was later reinforced that *Sewell* required ''sustained appeals'' to racial prejudice, again such going beyond statements germane to legitimate campaign issues.[24]

Comments ''obviously'' designed to express the views that blacks had not been treated fairly by their employer and that they needed to do something about it have been held to be comments directed to black employees' perceived relationships with their employer and their dissatisfaction with the terms and conditions of their employment. The question of whether employees have been unfairly treated for whatever reason is always a legitimate topic of discussion in a union campaign. Whether the remarks are even accurate as to the instant Employer is of little consequence in determining whether a ''legitimate campaign issue'' exists, since such statements to be objectionable must be so inflammatory as to make a fair election impossible.[25]

In the same vein, the Board looked at a statement by a union representative that a supervisor had called the employees ''dumb niggers.''[26] This, of course, contained clearly an offensive racial epithet, and, according to the Board, may well have been an untrue report of what any representative of the Employer had said. However, employees had complained about treatment at work, which rendered the offensive statement germane to the campaign. While the Board noted that it did not condone the use of racial or ethnic epithets, it found that the union representative did not attack a particular racial, ethnic, or religious group as part of an inflammatory campaign theme. Rather, said the Board, it was used as an attempt to denounce racial prejudice on the part of the Employer rather than to invite prejudice against a group or sect by the Union.

A more recent case involved a union, which, on the eve of an election, circulated a copy of a letter by a Japanese businessman that made assertions that contained elements of prejudice and bias against American workers. The distribution was to employees working for a Japanese-owned employer. Again, the Board noted that the treatment of employees had been an issue in the campaign. Thus, said the Board, it would look to the intent of the union under the *Sewell* criteria, to ascertain what a party ''seeks'' as well as the likely effect of such statements on unit employees. The Board held that even specific claims that a party to the election, or one of its agents, is biased in terms of race or national origin may be a permissible topic during an election campaign. How workers are regarded by management is a relevant campaign issue as are perceived work place attitudes between

[18] I.e., *Advance Products*, supra; *S. Lichtenberg & Co*., 296 NLRB 1302 (1981); *Pierce*, supra; *United Builders*, supra; *Cambridge Wire Cloth Co*., supra. Compare *Bristol*, supra, wherein the union abdicated its lead role to its employee organizers. Cf. *Bio-Medical*, supra, where both the union and the employee-agents were visible.

[19] *Kresge-Newark, Inc*., 112 NLRB 869 (1955).

[20] *Sewell Mfg. Co*., 138 NLRB 66 (1962).

[21] *Universal Mfg. Corp. of Mississippi*, 156 NLRB 1459 (1966).

[22] *Baltimore Luggage Co*., 162 NLRB 1230 (1967).

[23] *Bancroft Mfg. Co*., 210 NLRB 1007 (1974).

[24] *Coca-Cola Bottling Co*., 232 NLRB 717 (1977). Compare *YKK (U.S.A.), Inc*., 269 NLRB 82 (1984), in which, among other matters, references to Pearl Harbor and ''sneak attacks'' were found not to be germane to legitimate campaign issues.

[25] *Coca-Cola/Dr. Pepper Bottling Co. of Memphis*, 273 NLRB 444 (1984).

[26] *Beatrice Grocery Products*, 287 NLRB 302 (1987).

employees and employers. Although the Board questioned whether the union's distribution of the letter was a meaningful contribution to the campaign, it stated its task was solely to determine whether the conduct so clouds the election atmosphere as to require setting aside the election.[27]

2. Atmosphere in general

Assuming a finding of a lack of responsibility on the part of the petitioner to engage racial strife and prejudice to a level requiring a second election, I must, I believe, determine whether the actions of Peck and Holcomb may have damaged the requisite laboratory conduct.[28] According to the Board, *Sewell* by its own terms applies only to parties and their agents.[29] In *Lichtenberg*, an employee reported that a first line supervisor had allegedly stated to another supervisor that she did not want the union to come in ''because a bunch of niggers would be running the plant'' and that they should be sent ''back to the cotton fields.'' The election was not set aside. The supervisor allegedly involved denied the statement, which denial was widely disseminated. There was also no evidence that the union sought to take advantage of anything it reasonably believed to be a falsehood.

Cases involving ''rumors'' have been closely scrutinized. Thus, a rumor that the employer would replace ''Negro'' employees with white employees if the union lost an election did not result in the election being set aside where the Board found that the rumor was not sufficiently widespread.[30] In a later case, a rumor abounded through an employee that the employer's president had stated that, if the union won the election, he would discharge the ''Negro'' employees. Here, the Board found that the rumor was sufficiently neutralized and dissipated before the election by repeated disclaimer by both the employer and the union.[31]

Accordingly, I find a stricter burden of proof to be placed on the objecting party to establish that the conduct of third parties was of so serious a nature that it could only result in an atmosphere of widespread confusion and fear thereby rendering impossible a rational, uncoerced choice by the employees.[32] When the sources of alleged racial or ethnic appeals are third parties, they must further be analyzed to see if such statements were calculated to coerce votes for the prevailing party.[33]

III. THE PARTIES' EVIDENCE

A. *The ''Klan'' Leaflet*

The Employer's Exhibit 1 is photocopy of part of an article in the Sunday, July 26, 1981, edition of the Atlanta Journal and the Atlanta Constitution. It depicts persons in Ku Klux Klan regalia alongside a black man who is holding a sign that reads ''On Strike Bettter Working Conditions.'' According to the article, black and white employees of Zartic's Cedartown, Georgia operation were joined Klansmen on a picket line. The rest of the partial article dealt with the Klan and its activities.

According to Gary Tucker, called by the Employer as its first witness albeit an agent of the Petitioner, the Petitioner made this article available to employees of the Employer in response to the Employer showing films regarding the strike in Cedartown in 1981.[34] According to both Tucker and Petitioner's representative, Garney Browning, employees were concerned over discussions by the Employer about the Petitioner's involvement in the strike and racial hostility at Cedartown. Tucker stated that employees were discussing the racial tension and violence attendant to the strike as part of the campaign Rome.[35] Tucker said the article was made available to employees to defend against the perception that the Petitioner was involved at Cedartown, since it was the United Food and Commercial Workers' Union which organized Cedartown. Thus, according to Tucker, the article was used to show that the Petitioner was not responsible for racial tension at Cedartown.

Paulette Kirby testified that she saw this document when it was placed under her windshield in the plant parking lot.[36] She also testified that one was on her chair at ''a'' meeting, although not on chairs that she ohserved. Kirby did not recall the article being discussed at the meeting. With much leading and prodding by Employer's counsel, Kirby squeezed out that, at ''the meeting,'' ''that guy,'' apparently referring to International Representtive Rudy Rodriguez, stated that the Employer gave money to the Klan in Cedartown. No context was presented for this apparently isolated statement, and no corroboration was presented either. Kirby did tesify that she had ''heard'' that the Employer raised the Cedartown strike during the campaign, but asserted such was raised only after the Employer's Exhibit 1 was made available.[37]

Cathy Powell testified that ''they'' were handing out this leaflet at union meeting. Powell testified that she attended

[27] *KI (USA), Corp.*, 309 NLRB 1063 (1992).

[28] This is not encompassed by the strict wording of Employer Objection 1, nor the remand of the Board. However, I find it implicit in the litigation and subject to review and finding by me. Further to do so leads to no further possible litigation. See, e.g., *NuSkin International*, 307 NLRB 25 (1992).

[29] *S. Lichtenberg & Co.*, supra. See also *Brightview Care Center*, 292 NLRB 352 (1989), involving slurs by unidentified employees, and *Benjamin Coal Co.*, supra.

[30] *Hobco Mfg. Co.*, 164 NLRB 862 (1967).

[31] *Staub Cleaners, Inc.*, 171 NLRB 332 (1968). See also *Singer Co.*, 191 NLRB 179 (1971).

[32] *Owens-Corning Fiberglas Corp.*, 179 NLRB 219 (1969); *Foremost Dairies of the South*, 172 NLRB 1242 (1968).

[33] *Information Magnetics Corp.*, 227 NLR8 1493 (1977).

[34] The film shown at the January 29, 1992 meeting by the Employer discussed this matter. No one could place when this leaflet was prepared other than within a week or two of the election. The Employer argues strenuously the last-minute effect of such coming right before the election. Tucker agreed that it could have been made available the day before or two days before the election.

[35] Unfortunately, no employees were called to testify with regard to the Employer's campaign. The film shown to employees on January 29, 1992, did have references to Cedartown and the strike.

[36] Browning testified without contradiction that nonemployee petitioner representatives had no access to employee parking lots.

[37] Kirby's testimony is almost completely the words of Employer's counsel who either led her to a ''yes'' answer, or led her to repeat his words as her answer. I am unable to give much credence to her testimony because I can not glean therefrom what she actually knew or did not know. Because of the nature of the questioning, she was given no real opportunity to relate her own memory of events.

''some'' union meeting when the meetings first started. She believes the meetings she attended were probably in October since both the Petitioner and the Employer we having cookouts.[38] Finally, the Employer called Letitia Tello who testified that the Hispanic employees talked about the 1981 strike, but that she did not remember whether the Employer ever mention it.

Garney Browning is the co-director of organization for District 1 of the Petitioner. As such, he was in charge of the instant campaign. He testified that he got a copy of Employer's Exhibit 1 from the files of the attorney who represented the UFCW in its Cedartown campaign. Browning testified that employees were coming to meetings after the Employer had shown them a film, telling the Petitioner's representative that supervisors were telling employees that the Petitioner was involved in the Cedartown union campaign. Bronwning states that Employer's Exhibit was given out to explain that the Petitioner had not been involved in the Cedartown campaign. Browning states he told the employees what he remembered about the campaign. Browning states that this document was never used as a leaflet to be handed out at the Employer's premises. International Representative Rudy Rodriguez, who made the copies of newspaper article, testified also that employees were telling him that the Employer was saying the Petitioner was involved in the Cedartown strike. Rodriguez stated that the handout was to deny his union's involvement. Apparently, he thought, the verbal denials by Petitioner's representatives were less persuasive than a newspaper article.

B. *The ''Murder'' Leaflet*

Employer's Exhibit 2 is a photocopy of another partial article, apparently from the November 30, 1981, edition of the Atlanta Constitution. The part of the article reproduced discussed the death an alleged illegal Mexican alien who had gotten a job at Zartic in Cedartown. No mention was made in the article about any labor matters or union activity. According to employee Letitia Tello, the article was passed out at a union meeting. Originally she testified that she could not remember any conversation about the leaflet. Later, when ''refreshed'' on the Employer's redirect examination with an affidavit she apparently gave to the Board, she remembered discussing Employer's Exhibit 2 with union officials. According to this new recollection, Rodriguez told the employees that the Ku Klux Klan had killed ''that boy.'' She admitted that no union official ever said the Employer was responsible for the death of the featured young man.[39] The Employer also argues that the alleged statement by Rodriguez testified to by Kirby and discussed, supra, that the Employer gave money to the Klan, proves in some way that the Petitioner was saying that the Employer paid for the killing of this unfortunate youth. The Employer provided no factual context from which I could draw such a conclusion.

Petitioner's representative, Browning, says that he also got this document from the files of the UFCW from its Cedartown campaign. He states he had the document in his office ''as a matter of information or historical value as to about the Mexican people's problems in this area.'' He said copies were made which remained in the office for about 3 days. Tucker testified that the Petitioner did make copies of the partial article, which copies were in the Petitioner's office. He said they were not openly distributed.

C. *The Peck Tapes*

The Employee argues that Chad Peck was an agent of the Petitioner who introduced into the campaign a tape recording he made of a conversation in which certain derogatory comments allegedly were made about Mexican employees. According to the Employer, the Petitioner made use of this tape recording to fuel the flames of ethnic (racial) unrest against the Employer.

Paulette Kirby testified on behalf of the Employer. She testified that she attended two preelection meetings at the Rome union hall. According to Kirby, a ''Mexican guy'' sitting beside her at a meeting to the ''union guys'' that Francois Gaulin ''had called the Mexicans a pack of dogs, rats or something like that.'' She alleges that Petitioner's representative, Rodriguez, translated the remark. Kirby cannot speak Spanish, and the speaker spoke no English. No tape recording was played at this time, although, according to Kirby, a tape was discussed.[40]

Letitia Tello, another Employer witness, testified that she also attended a couple of union meeting at the IUE hall. At one of these meetings, she recalled talking to Petitioner's representative, Eddie Felan, who ''started telling me about Francois, that he had a tape about Francois saying that he said that Mexican people were animals and they should be treated as animals.'' According to Tello, Felan had asked her early in this conversation to help him house call on behalf of the Petitioner. This conversation was between the two of them and was after the Petitioner's meeting at which this racial matter had not been discussed. Felan allegedly promised to play the tape, but he never did.[41] She also testified that the tape was not discussed at all at the other meeting she attended.

Esteban Cortez testified that he attended a meeting at the Holiday Inn with approximately 50 employees, the majority of whom were Mexican. He initially stated that certain union representatives whose names he did not know, but then he identified as Rodriguez and ''Eddie,'' played a cassette. The recording, according to Cortez, spoke about Francois Gaulin saying Mexicans liked to live like animals so that is the way they were going to be treated, as animals. Cortez acknowledged that the recording was in English with background plant noises and that he could not understand it very well. The recorded words were not translated into Spanish, but ''Mr. Eddie'' said it was Francois' voice on the tape. He said some employees got very mad at the hearing of the tape, but that these were employees who had worked with Gaulin and who said Gaulin treated them ''very, very badly.'' Cortez later testified that he could not say that he heard the word

[38] October would precede the filing of the petition and would also precede every one else's memory of when the leaflet was made available. As I note later, Powell appeared confused about every detail of her testimony.

[39] The Employer brought out through this witness that Hispanics were afraid of the Ku Klux Klan and that the Cedartown strike was a topic of conversation among the employees. She could not remember whether the Employer ever mentioned the strike.

[40] See fn. 37, supra, with regard to Kirby's testimony.

[41] Felan was not called as a witness at the hearing.

''animals'' on the tape, that he could not understand the tape very well, and that he was not close to the cassette player.

Cathy Powell was the final employee witness concerning the tape called by the Employer. She stated that she attended a ''meeting'' at which tape regarding a statement Gaulin allegedly made was discussed. ''They said they had a tape that Francois made telling about the Mexicans eating like animals and sleeping like animals.'' According to Powell, she heard several of ''them say that it was not Gaulin's voice on the tape,'' and stated she knew it was not his voice on the tape. She ultimately testified that she heard the tape at a trailer in West Rome, Georgia, with a group of six to seven employees.[42] She said the voice on the tape was not Gaulin's but was only Chad Peck's voice on the tape. According to her, Chad Peck had told her before that it was not Gaulins' voice on the tape, having earlier testified that Peck had told her that he taped ''Francois about the Mexicans.''[43]

Chad Peck was called by the Petitioner to testify. Peck stated that he began carrying a pocket tape recorder around the plant in mid- to late November 1991.[44] He said that things were becoming ''strange'' in the plant because of the Petitioner's campaign, and that two of his coworkers, Donald Johnson and Bill Baker, had been discharged. He asked his ''supervisor,'' Steve Mayes,[45] why the two were discharged. According to Peck, Mayes stated he did not know. Later in the day of this query, Mayes returned to the shop where Peck was. Peck states he had the recorder on to get ''incriminating evidence'' as to why the two employees had been discharged. He testified he wanted also to record conversations to protect himself.[46]

Peck states that Mayes began talking about the two employees. Mayes then said that, within the first week he started working in the plant, Gaulin called him, James Holder, and Tommy Owens into the office. At that time, according to Peck, Mayes said that Gaulin had stated that the Mexican people who worked there live in trailers with no electricity and no heat, and that they slept on the floor. Mayes went on that Gaulin stated that they were the closest things to animals and to treat these people like animals. You have to push these people and push them.

The tape recording was introduced into evidence, played in pertinent part on the record, and transcribed into the record by the court reporter. I too have listened to the tape and find the version transcribed very close to what I heard. Many words are unintelligible, some conversation is one speaker over the other speaker, and there is noise in the background. Contrary to the testimony of Cathy Powell, distinct voices are discernible on the tape. The early part of the conversation is a discussion of an incident that occurred in which discipline was apparently meted out to some employees. Mayes then stated that the very first week he worked at this plant he heard Gaulin ''cussing'' people. Mayes continued that Gaulin got him into the office one day and told him, and possibly two other persons, ''you've got to push these people.'' ''You've got to push these people. Most of these people sleep on the floor of a trailer that ain't got no damn electricity. They're the closest things to animals they could be.'' According to Mayes, Gaulin continued, ''You've got to treat them that way.'' Mayes stated he shook his head and left the office. Further conversation about Gaulin's management style ensued on the tape. Neither I nor apparently the court reporter discerned the word ''Mexican'' on the tape.

Peck further testified that he had mentioned to the Petitioner's representative, Tucker, that he had some recordings. According to Peck, the representative told him ''Just put them up and keep them. They might be of some use in the future if we get in a tight spot.'' Peck placed this conversation in late December 1991, subsequent to his December 3, 1991, discharge, allegedly for union activities. He first had told Tucker he had some tapes of conversations between himself and a couple of supervisors in his discharge meeting. Only later did he tell Tucker about the Mayes conversation and, at Tucker's request, made him a copy. Later, according to Peck, Tucker called him and said he could not understand the tape. Peck states he also had told some fellow employes he had a tape recording of someone repeating what Gaulin had said. He was asked about it by Representative Rodriguez who asked for a copy of the tape. Peck made Rodriguez a copy, but it apparently was not comprehensible. Two weeks later, Peck played the original tape for Rodriguez who told Peck, ''Boy, I wish you'd got this to me earlier.'' Peck said he told about 30 people about his tapings, including playing them for some people. These tapings included the Mayes' discussions as well as a ''bad attitude'' lecture to Peck, and other recorded conversations. No one pursued how many playings to employees involved the alleged Mayes/Gaulin conversation.

Petitioner's representative, Browning, stated that, during the campaign, employees complained at union meetings concerning treatment they had allegedly received at the hand of Gaulin. He further testified that he had heard rumors that there were numerous tape recordings made by some ''8(a)(3) people'' who went into supervisors' meetings. He had also heard rumors that a tape existed that had some derogatory statements in regard to Gaulin. Browning states he never had a copy of the tape until after the election although he heard Rodriguez had heard it. He recalled asking Rodriguez for a copy of the tape and being told the copy was not a legible copy. He also stated he never mentioned the tape during all meetings he conducted.

Representative Rodriguez testified that Peck helped with the handbilling at the East Rome plant. During one of these times, Peck mentioned to Rodriguez that he had taped several conversations. They discussed generally what was on the tapes at first. Later, when the conversations got more specific, Rodriguez said that if someone were making racial remarks he definitely would be interested in that portion of the

[42] Powell did not seem to know any of the employees or persons present. She identified no union representatives, and, in fact, testified that this was not a meeting as such but a cookout among friends. A goodly part of Powell's testimony was volunteered when no question was pending. I was not favorably impressed.

[43] Counsel for the Employer attempts in his brief to explain the inconsistencies in this testimony. I was not persuaded thereby.

[44] While I do not like the surreptitious recordinys of conversations, Peck's motives in so doing can be understandable, especially in view of the allegations in the order consolidating cases, consolidated complaint and notice of hearing issued in Cases 10–CA–25786, 10–CA–25909, and 10–CA–26161. Although such is not a finding of guilt, I assume the Employer placed it in evidence for some probative purpose.

[45] Mayes' status is discussed, infra.

[46] Contrary to the assertions in the Employer's brief, Peck never testified that he wanted incriminating evidence for use in the Petitioner's campaign.

tape and would like to listen to it. Rodriguez said he listened to the tape, generally hearing what had been played earlier during the course of the hearing. He said he asked Peck for a copy, which he got on a regular cassette. He said he attempted to play it at a trailer meeting with 7 to 10 employees but that the quality was so poor no one could understand it.

Rodriguez also ''used a copy'' of the tape at a meeting he held at the Holiday Inn about 2 weeks before the election, and he and the 10 to 12 employees present discussed it at that meeting. Later, assumedly prior to the election, he tried to play the tape for employee Garcia. Garcia had brought two unidentified employees to Rodriguez' room at the Holiday Inn. Rodriguez invited employees to come hear the tape, once he had secured a better tape recorder on which to play the tape.

Representative Tucker acknowledged that he heard about the tape recordings during the campaign and that the Mayes-Peck recording was played for some employees during the campaign by Rodriquez. He further testified that the tape was discussed at a meeting he attended, albeit the tape was not played. Employees asked about the existence of such a tape, to which, according to Tucker, Petitioner's representatives responded they had heard rumor of the existence of such tapes. Peck had told Tucker that he had made tapes for his own protection, and Tucker believes Peck had told him that Steve Mayes' voice was on the tape.

D. *The Mark Holcomb Affair*

The Employer claims that Holcomb, as an agent of the Petitioner, incited employees to riot on January 29, 1992, by injecting racial slurs into an employer-sponsored meeting. Francois Gaulin was present at this meeting. According to Gaulin, the Hispanic employees watched a videotape in Spanish in one room and English-speaking employees watched an English-language tape in another room. After the videos were shown, both groups came together. East Rome Plant Manager Thomas Owens and Corporate Director of Human Resources Walter (Rusty) Raybun presided over a question-and-answer session. After some unspecified questions by unspecified persons, Mark Halcomb, ''out of the blue,'' walked forward to the stage and said he had a few questions to ask. According to Gaulin, Holcomb jumped up on the stage, pulled out a pad, and asked about a pay raise, which question created some grumbling among the assembly. Holcomb then asked, ''What about this tape?'' To the return question ''what tape?'' Holcomb allegedly said, ''Tommy [Owens], the tape that you said about the Mexicans living like animals and sleeping like dogs on the floor and eating like pigs.'' According to Gaulin, at that point ''everybody'' got up, approached the stage, and ''chairs were flying.'' Owens said that he had never said anything like he was accused of saying, whereupon Holcomb allegedly turned toward Gaulin and said no—''You, Francois, was on this tape.'' Everyone then turned toward Gaulin and started toward him. Raybun then asked Holcomb and all non-East Rome employees to leave, so Gaulin left and walked back to the plant. The following day, at a meeting assembled by the Employer, Gaulin told the employees that he had never made such a statement of which he stood accused and offered $1000 for a copy of any tape.[47]

Antelmo Tello, one of the Employer's production supervisors, was translating at this question-and-answer session along with a female translator who, curiously, no one seems to know.[48] Tello testified he translated what he understood was being said, but that the unknown translator understood English better. Tello testified that he did not translate all that went on, only what he understood. If he did not understand what was going on, Tello testified he did not translate at all. He stated he translated only part of what Holcomb said without telling what part he did translate.[49] Tello was not questioned by the Employer, whose witness he was, about other aspects of the meeting. Counsel stated his interest in calling Tello was solely about postmeeting events.

Plant Manager Owens testified that the meeting was held of all East Rome first-shift employees, originally divided into two rooms. The employees reassembled for a question an answer period. A few unnamed people asked questions which were answered. Holcomb then got up, fumbled, through his pad, and asked a question about pay. Following this, some other employees asked questions before Holcomb stated he was not through with (with his questions) yet. Holcomb then asked a question Owens does not recall, followed by ''what about this recording of you saying that the Hispanic people live like animals so you might as well treat them like animals?'' Owens states that employees jumped up, with chairs clattering, and came toward the stage. Owens called Holcomb a liar, whereupon Holcomb said, ''Don't you remember you said that Hispanics live like animals and you should treat them that way.'' Owens says he denied this. Holcomb then said he did not mean it was Owens that made the statement, but Gaulin. According to Owens, after Holcomb and Gaulin left, he assured the employees he had never made such a statement. The next day a meeting was held with assembled employees in which Gaulin denied the statement attributed to him.[50]

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[47] Testimony both by Gaulin and about Gaulin was intriguing. Gaulin testified that he was so bothered by the events of January 29, 1992, that he immediately gave a statement to corporate counsel of all that had happened that day. He recalled signing a statement that was ''word to word'' what had happened to him on January 29, 1992. It was to Gaulin an accurate reflection of what had happened at the meeting. Further, he testified that he told the attorney everything that happened and the statement was word for word what he told the attorney. The statement, in evidence as P. Exh. 1, makes no mention of any chair throwing or other riotous conduct. On redirect, counsel for the Employer attempted to impeach Gaulin by getting him to testify that, perhaps, P. Exh. 1 was not as precise a statement as he had so painstakingly described it on questioning by the Petitioner's counsel. Needless to say, I was left finding Gaulin with little or no credibility.

[48] Employer's counsel continually refers to this ''production supervisor'' as an employee, apparently to bolster his credibility. However, Tello knew he was a supervisor and so testified.

[49] Tello testified at the hearing through an interpreter.

[50] Owens originally stated he was hired as plant manager of the East Rome plant to boost production and morale. According to his testimony on the Employer's direct examination, morale was getting better until the ''union time.'' On cross-examination, he testified that morale was improving until January 29, 1992. He flatly denied that he had earlier testified as I have set forth. He did not testify that the meeting was what he meant by his earlier testimony, he just denied having so testified. Owens also testified he did not remember

Raybun testified that the majority of the employees at the meeting were Hispanic, the vast majority of whom are recent immigrants who do not speak English. He stated there were only about 10–12 English-speaking people in the room where the English version of the video was played. Raybun testified that, after several employees from the reassembled group raised questions, Holcomb approached the stage and said he had some questions. Holcomb came up on the platform and pulled from his pocket a notebook and asked his questions. After his question about pay raise and other questions from the floor, Holcomb shouted out he had more questions. He then asked, ''What about this tape that Tommy Owens says that Hispanics live like animals and should be treated like animals'' or ''something to that effect.'' According to Raybun, several employees got up asking each other what had been said. Owens was calling Holcomb a liar, and Holcomb, according to Raybun, repeated his accusations against Owens several times. Finally Holcomb said that Gaulin had uttered the words, and the crowd's attention shifted to Gaulin. Raybun then asked Holcomb to leave the meeting.

Mark Holcomb was presented by the Petitioner as a witness, and he testified as to his actions at the January 29, 1992 meeting. According to Holcomb, he borrowed a notebook from a fellow employee to write down questions he wanted to ask. When he got the floor, he asked questions about a pay raise and other problems. He then asked why it was that certain people in management were allowed to say that people lived like animals and should be treated like animals. Raybun got upset when this question was asked, and Owens called Holcomb a liar. Holcomb replied that he had heard Owens make that statement saying that, in a shop conversation, Owens had said that Gaulin had made the statement and that there was a tape of it. Owens and Raybun started telling Holcomb to leave. He left.

According to Holcomb, Owens had earlier, in the plant's maintenance shop, told Supervisor Jo Melton, ''do you know what Francois just told us? He said, Francois told us that these people live like animals and they should be treated like animals.''[51] Holcomb took it that ''he was 'insinuating' Mexican people.'' Holcomb had also heard the rumor about a tape that Chad Peck had before he raised this matter at the meeting. The next day, according to Holcomb, Owens came up to him and asked if he knew how bad Holcomb had hurt ''us'' yesterday. Holcomb told Owens he was just tired of hearing lies from the company and false statements from management.

E. *The Facts About Agency*

The Employer contends that Peck and Holcomb engaged in the acts described above as agents of the Petitioner with the concomitant responsibilities thereupon. The Employer relies on the testimony of the Petitioner's representatives, Peck, Holcomb, and Supervisor Tello. Thus, I will approach the facts in a different manner than earlier, wherein I related first the Employer's evidence, because the story will unfold with greater ease that way.

Garney Browning testified that the Petitioner was receiving calls from employees of the Employer regarding interest in union representation. Small meetings were set up with employees in early September 1991, to sample interest. When such small meetings proved fruitful, a larger meeting was staged in the latter part of September or early October 1991, at which 110 to 130 employees were in attendance. It was determined that a campaign was viable and weekly meetings and the distribution of leaflets began. Apparently Tucker was there early in the campaign. Later Eddie Felan and Rudy Rodriguez, bilingual representatives, were sent in to help the campaign under the direction of Browning.

The campaign existed basically of house calls by these representatives, accompanied by employees on occasion, mass meetings at the IUE hall in Rome, smaller meetings at the Holiday Inn at which Rodriguez came to reside as the election drew near, and the distribution of leaflets at the two plants. Employees also got signatures on a petition used by the Petitioner in lieu of traditional authorization cards.

Chad Peck admittedly was active in the campaign, getting, according to Peck, about 50 employees to sign the petition for union representation. As noted earlier, he helped with handbilling subsequent to his discharge on December 3, 1991. Around the middle of November 1991, Peck, along with other employees, signed a document which stated, ''I hereby pledge to be a member of the organizing committee and pledge to represent my department at special called meetings for the purpose of organization.'' According to Tucker, the purpose of this committee was for its members to attend the meetings and carry back information to employees, encouraging them to come to the meetings. After the discharge of Peck the Petitioner did pay him $50 per week for his personal expenses. Peck states he, in turn, gave the Petitioner gas receipts, lunch receipts, and receipts for other organizing expenses.

Mark Holcomb, despite his testifying, remains an enigma. He testified first that he had no involvement with the Petitioner prior to the January 29, 1992 incident at the Holiday Inn. He testified that he had attended no meetings up to that time and treated both the Union and the Employer's handouts as ''garbage.'' On cross-examination, it was revealed that he ''may'' have gone to the first union meeting, and that, in December 1991, he had signed a petition in support of the Petitioner.[52]

According to Tucker, Holcomb appeared to have some early interest in the Petitioner and attended early meetings, but thereafter withdrew from participation. Garney Browning testified that, sometime after an election date was set pursuant to the Decision and Direction of Election, which issued January 8, 1992, he received a telephone call from Holcomb. Holcomb asked a lot of questions of Browning about issues of the campaign, which Browning undertook to answer. Browning asked Holcomb to start coming to the union meetings, but Holcomb refused, averring the recent birth of a baby and a fear of losing his job. The Employer's ''smoking gun'' evidence of Holcomb's agency status was the reason it called Antelmo Tello to the stand. According to Tello, as he departed the Holiday Inn after the January 29, 1992 meet-

whether the film shown to employees on January 29, 1992, mentioned the Cedartown strike or violence attendant thereto. I find this loss of memory to limit my belief in the accuracy of other testimony he gave.

[51] Supervisor Melton was not called a a witness, and Owens was not asked, on this record, whether he had had such a conversation with Melton.

[52] No such petition was introduced at the hearing.

ing, he saw Mark Holcomb in Chad Peck's car with Eddie Felan outside the motel. The Employer also relies on a post-election selection of Holcomb as a member of the Petitioner's steering committee. The Employer, in effect, argues that Holcomb had to be a union agent to do what he did at the Employer's meeting, surfacing only then and after as the activist he was.

Holcomb testified that, on being ordered out of the meeting, he left the motel, got his car at the plant, and drove to his nearby home. When he got home, he called Chad Peck to tell him what had happened at the meeting. He asked Peck about the existence of the tape recording about which he had heard because he had brought the matter up in the meeting. Peck went to Holcomb's apartment, and drove him, in Peck's car, to see Eddie Felan. There is no dispute that the three were together in Peck's car at the Holiday Inn shortly thereafter. It is also not in dispute that Holcomb was elected to the Petitioner's steering committee after the election.

Throughout the hearing the name of Sabarino ''Pops'' Garcia came out, albeit the spelling of his first name varied throughout, apparently the Employer seeking to tie him in to some misdeeds on behalf of the Petitioner. However, neither party really pursued his status on the record. He was an employee, he attended union meetings, he brought employees to see Rudy Rodriguez, and he allegedly stood outside the East Rome plant gate waving a cassette after the January 29, 1992 meeting, telling the Employer that this was proof that he had that Gaulin was saying bad things about the Mexicans. The Employer avers he served as the Petitioner's observer at the election.

According to the Petitioner's evidence Garcia did attend some meetings did bring some employees to see Rodriguez. However, it was also testified that Garcia was seen outside the East Rome plant the night before the election holding a ''vote no'' sign. Further, according to the Petitioner's witnesses, Garcia served as the Employer's observer. No one really explored these discrepancies, Garcia did not testify, and no further evidence was proffered concerning his observer status by people who may have seen him on election day.

F. *Who is Stephen Mayes?*

As the reader hereof and of the record will take note, Stephen (Steve) Mayes is the other voice on the infamous Peck recording. According to Peck, Mayes was his supervisor because he was a ''red hatter,'' supervisors apparently wearing red hats at the plant to denote their status. According to Peck, Mayes worked for 2 weeks on the first shift. Thereafter, Peck was told by Supervisor Gary Murphy and Mayes at a shift change that Mayes would be going to the second shift, on which Peck worked, and would be ''in charge'' of the second shift. Neither Mayes nor Murphy was called to testify. According to Raybun, Mayes went to the second shift as a ''supervisor trainee,'' and, ''at some point time'' he became a supervisor. According to Raybun, Mayes had the authority to direct the work of employees and such employees were required to follow his instructions. When a line of questions began on the difference in a ''supervisor trainee's'' authority and that of line leaders, a nonsupervisory position, Raybun asked that the counsel ''quit splitting hairs.'' He said that the Employer's ''supervisory structure'' involved the plant manager, production manager, supervisors, and supervisor trainees.

Mayes' own words on the taped conversation with Peck are instructive since Mayes was not on notice his status as an employer spokesman would later be put in question. He discussed the fact that he had given reprimands to four employees who had then filed racial discrimination charges against him over the reprimands. He alluded to his authority to let employees go home by telling Peck that, if the Petitioner were successfull in its campaign, he would lose his authority to do so. Peck testified further that he had seen Mayes send employees home.

The Employer's counsel was a model of inconsistency on this issue. He states early on the record that he ''believes'' Mayes was a supervisor ''at that time.'' Later, notwithstanding his representation of this Employer over this long period of time, he stated he was lacking sufficient information on Mayes' 2(11) status. Since the Employer placed before me the consolidated complaint in Cases 10–CA–25786 and 10–CA–25909 issued May 29, 1993, I have taken administrative notice of the answer filed by counsel to that consolidated complaint. In paragraph 6 of the complaint, it is alleged that ''at all times material herein'' Steve Mayes occupied the position of supervisor, and was supervisor and agent of the Employer. (Respondent in the complaint.) The complaint alleges wrongdoing on various dates between November 8, 1991, and March 31, 1992, with Mayes' alleged transgression being on about November 26, 1991. Paragraph 6 of counsel's answer states, inter alia, that ''Z-Bird admits that at material times, the following named individuals were employed at Z-Bird as follows: . . . Stephen Mayes, Supervisor.'' I note the lack of the word ''trainee'' in this admission. I notice further, to give credit or discredit to counsel's ingenuity, the answer filed by counsel to the complaint in Case 10–CA–25786 wherein he admitted that ''Steve May [sic], Supervisor'' occupied that position ''at certain time'' and that ''during such times, Mayes was a supervisor within the meaning of Section 2(11) of the Act.'' To continue in this mode of discovery, I notice the answer filed by counsel to the amended consolidated complaint in Cases 10–CA–25786, 10–CA–25909, and 10–CA–26161, wherein the language changes yet again to admit that, ''at certain times,'' ''Stephen Mayes, Supervisor'' was employed ''as follows.''

Section 102.21 of the Board's Rules and Regulations states that the signature of an attorney on an answer constitutes a certificate by him that he has read the answer and that, to the best of his knowledge and belief, there is good ground to support it and is not interposed for delay.[53] In common translation, one would see this to be an affirmation that an attorney's signature has some effect on the credibility of the answer, even though unsworn, since such would become part of the record were a hearing held and encompass material facts upon which an ultimate decision could be influenced.[54] Conceding that the continual issuance of seriatim complaints and concomitant answers thereto may have the effect of revoking prior answers, I find logic in the pronouncement of the Seventh Circuit Court of Appeals in *Contractor Utility*

[53] See *M. J. Santulli Mail Service*, 281 NLRB 1288 fn. 1 (1986).

[54] See, e.g., *United States of America v. Joseph Krause*, 507 F.2d 113 (5th Cir. 1975); *Air LaCarte Florida, Inc.*, 212 NLRB 764 (1974).

Sales v. Certain-Teed Products Corp.,[55] that an amended answer filed subsequent to a change of counsel, which denied facts admitted in an original counsel's answer, did not remove the original answer from consideration. Although the original answer ceased to be a ''conclusive judicial admission,'' it ''still remains as a statement once seriously made by an authorized agent, and, such, it is competent evidence of the facts stated, though controvertible, like any other extra-judicial admission made by a party or his agent.'' This should apply moreso where the answers are all filed by the same counsel.

IV. FINDINGS

A. *Agency*

The evidence presented by the Employer falls short of establishing either Chad Peck or Mark Holcomb to be agents of the Petitioner. Peck's position and activities vis-a-vis the Petitioner constitute a closer case, but the Employer throughout has emphasized the heavy involvement in the campaign of Browning, Tucker, Rodriguez, and Felan. The Petitioner had a strong, regular, and continued presence during the entire campaign, and the employees had the benefit of this presence to learn therefrom the Petitioner's policies, practices, goals, and position on the various issues. This negates the possible manifestation of Peck as the Petitioner's agent on issues of concern to employees, notwithstanding his handbilling, his steering committee membership, and his signature solicitations. Accordingly, on this record I find Peck not to be an agent.

The question of Holcomb and his activities remains a mystery. I do not know why he stood up at the January 29, 1992 meeting and addressed racial or ethnic matters. I do know that the Employer has failed to establish him to be the Petitioner's agent at this time. Questions in brief about his possible (probable) motives do not substitute for proof.[56] I do not find that his seeking out Chad Peck who thence led him to the company of a union representative constitutes evidence that the Petitioner, by seemingly giving comfort to a worried employee, thereby ratified his prior actions at the meeting. Indeed, there is no evidence that Felan, at the time, even knew what had transpired at the meeting.

B. *Stephen Mayes*

I find that when Mayes, at the time he spoke on tape with Chad Peck, was an individual who, if not a supervisor, had been placed in a position by the Employer that employees, like Peck, could assume that he had both the ear and voice of management. Thus, when he discussed the conversation he said he had had with Gau]in, it was as a spokesman for the Employer whether as supervisor or agent.

C. *The Racial (Ethnic) Appeals*

1. The Petitioner's activities

I have found, above, that neither Peck nor Holcomb was an agent of the Petitioner, and, thus, I find that whatever their activities were in regard to the racial (ethnic) allegations, the Petitioner was not responsible therefor.[57] In accord with this finding, I will reserve discourse on the effects, if any, of Holcomb's activities on the election to subparagraph (2) following. In analyzing the Petitioner's use of Employer's Exhibits 1 and 2 and in its handling of the Peck tape recording, I look back to the prevalent words, cited in the earlier analysis of legal precedent.[58] I find, especially from a reading of the Petitioner's handbills introduced both by the Employer and the Petitioner, that race or ethnic prejudice was not the focal point of the Petitioner's campaign.[59]

Based upon the applicable precedent, I find that the Petitioner has not been shown to have engaged in a deliberate, sustained, calculated campaign to appeal to racial (ethnic) hostilities, prejudices, or animosities. I find the use by the Petitioner of Employer's Exhibits 1 and 2 to be stupid and lacking in taste, but, based upon the campaign as a whole, I do not find a deliberate attempt to overstress, exacerbate, or inflame passion to be the intent of these documents. The videotape about Cedartown to which the Petitioner in part responded, could easily be seen and heard, especially by the unsophisticated ear, to relate to the Petitioner. While it begins with discussion about ''a'' union, the bulk of reference in the tape is to ''the'' Union. The use of ''the'' is especially pronounced when the employees on the tape begin discussing their expressed view of the downside of union representation. Further, contrary to the memory expressed by Plant Manager Owens, it is clear on the video that violence during the Cedartown strike is discussed. Thus, for the Petitioner to address the fact that the Klan began the strike, joined by other employees, to show the Petitioner was not involved is not beyond the realm of credibility.[60] Likewise, the use of Em-

[55] 638 F.2d 1061, 1084 (7th Cir. 1981).

[56] Contrary to the Employer's assertions in brief that Holcomb called Browning during the campaign to ''express his interest in unionization'' (Tr. 284), the record reveals Holcomb called concerning questions he had about the campaign.

[57] As noted earlier, I deign to find anything about the status of ''Pops'' Garcia because of the evidence before me. To the extent the burden falls on the objecting party, I find the Employer failed to prove Garcia to be an agent of the Petitioner. The same is true about the various other names brought up without connection during the course of the hearing.

[58] I lend no credence to the implied argument that the Petitioner's use of bilingual representatives and bilingual handbills somehow appeals to racial prejudice, nor do I find it sinister that the Petitioner invited Hispanic and/or bilingual speakers to address the employees. Even the Employer showed videotapes separately to employees based upon their abilities to comprehend English.

[59] The Employer points solely to P. Exh. 22, admittedly handed out 1 to 2 days before the election wherein the term ''treat like humans'' appears. No racial or ethnic considerations appear on this handbill, although an earlier handbill discusses employee treatment whether native or immigrant. R. Exh. 3L.

[60] Indeed, the Employer presented evidence that the Klan and its allies sought the discharge of Hispanic employees at Cedartown some of whom now work at Rome and/or have relatives that do. It can not really be argued that use of the Klan would reasonably tend to cause Hispanics to support the Klan's ''ally,'' the Petitioner herein.

ployer's Exhibit 2 is perhaps tasteless but I fail to find a link between it and the campaign. To whom would such appeal? Absent an answer to that question, I find it nonobjectionable.

Finally, I look to see whether the Petitioner's use of the Peck/Mayes tape violated the concepts of *Sewell* and any of its progeny discussed supra. The iterated conversations by Mayes allegedly quoting Gaulin involving employees living like animals and being treated like animals were volunteered hy Stephen Mayes in an otherwise unrelated discussion. Why all who testify that they heard the tape seem to think it refers on the audible tape to Hispanic or Mexican employees escaped my hearing and apparently that of the court reporter. According to the Employer, in its request for review concerning the dismissal of its objections, the Petitioner injected racial prejudice by ''repeatedly trying to convince employer that certain company managers and executives were racial bigots who were prejudiced against Hispanic employees.'' Unfortunately for this point of view, it was Mayes who allegedly quoted Gaulin, not any representative of the Petitioner. Although the Petitioner played the tape for employees and discussed the tape, the Employer has not established its own argument that race was the centerpiece of the Petitioner's campaign. Even its own witnesses did not so testify, and according to their testimony, the playing or discussion of the tape at various meetings or gatherings was low key and hardly the main topic of the meeting. Further, the Employer presented evidence that Gaulin denied saying what he was accused of to all assembled employees.

Accordingly, I find that the Employer has not proven its allegation with regard to the Petitioner carrying on a campaign of racial bigotry and prejudice warranting setting aside the election.

2. Third party conduct and/or general atmosphere

The Employer did not specifically plead this allegation in its Objection 1, but has argued for a finding that, even if it failed to prove that the Petitioner was responsible for injecting racial bigotry into the campaign, the overall cumulative effect of Employer Exhibits 1 and 2 along with the actions of Peck and Holcomb created a general atmosphere of racial hostility which corrupted the election processes. I find, to the contrary, that, to the extent that prejudice and bigotry became a part of the campaign, it was basically caused by the Employer. As stated above, it was Mayes, not the Petitioner, whose voice on the tape led people to believe Gaulin was prejudiced. Also, in the absence of record denials by Owens and Melton, it was Owens who allegedly quoted Gaulin in the presence of Holcomb.[61] Thus, to accuse the Petitioner of insensitivity in citing what appears to be the feelings of certain supervisors and managers toward certain groups of employees reflects an attempt by the Employer to capitalize on its own words which have come back to haunt it.[62] While these types of quotes dealing with a substantial portion of the Employer's workforce are distasteful, distressing, and to be condemned, it can not be said that the Petitioner thereby introduced this subject in a manner requiring the election be set aside.[63]

RECOMMENDATIONS[64]

It is recommended that the Employer's Objection 1 be overruled in its entirety. It is further recommended that the Certification of Representative heretofore issued, but stayed by the Board's Order of December 3, 1992, be reinstated.

[61] Although Owens testified he told the employees on January 29, 1992, he had made no such statements, he was not asked on this record whether he had, in fact, done so. Supervisor Melton was not called as a witness at all.

[62] The Employer tried its best to shield Gaulin from scrutiny. Thus, it argued to the Board in its request for review that Gaulin was at the corporate headquarters ''physically separated from the eligible voters,'' apparently hinting that a racist statement by him could not be a legitimate campaign issue. What the Employer hid from the Board was that Gaulin had been assigned to the East Rome plant to assist Plant Manager Owens during the campaign. In its brief posthearing, the Employer argued that Gaulin spent his time in an office, whereas even Gaulin testified he spent ''most'' (not all) of his time in the office. What is further left unsaid is that Gaulin was at the January 29, 1992 meeting; had attended other meetings with employees regarding the union campaign; and had participated in meetings of management in which corporate strategy was discussed whereby the Employer hoped to defeat the Petitioner. Gaulin was not the ''far removed company executive'' of which the Board was apprised in the Employer's request for review. Indeed, he had earlier been plant manager at East Rome and known to employees.

[63] In its request for review on the denial of its objections, the Employer sarcastically blasted the Regional Director for not relying on its one witness to the Holcomb event to set these matters for hearing. As counsel argued, more than 100 employees witnessed the January 29, 1992 event, and the Employer ''could have provided countless affidavits reiterating every detail.'' At the hearing, the Employer produced none of these employee witnesses to this event. Perhaps one could surmise their recollections of the meeting were adverse to the story the Employer sought to have believed.

[64] As provided in the Board's Decision and Order Remanding Proceeding for Hearing, either party may, within 14 days from the issuance of this report, file with the Board eight copies of exceptions. Immediately upon filing exceptions, the party filing then shall serve a copy on the other party and shall also file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendation of the report.