

Millard Processing Services, Inc. and District Union Local 271, United Food and Commercial Workers International Union, AFL-CIO, Petitioner. Case 17-RC-10493

August 27, 1991

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 29, 1990¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 114 for and 84 against the Petitioner, with 10 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the Petitioner's exceptions and brief and has decided to adopt the hearing officer's findings and recommendations only to the extent consistent with this Decision and Certification of Representative.²

Contrary to the hearing officer and our dissenting colleague, we do not find that the videotaping of employees during union handbilling outside the Employer's premises on the afternoon before the election warrants setting aside the election. As explained below, we find that the video camera was not being operated by someone whose conduct is attributable to the Union, and we further find that, under the Board's standard for assessing third-party conduct, the videotaping was not objectionable. Accordingly, we reverse the hearing officer and overrule the Employer's Objections 1 and 2.

Patrick O'Neill was the Union's general organizer during the election campaign at the Employer's plant, and he was assisted by Union Representative Felipe Morales, who acted principally as liaison to those in the Employer's work force who were Hispanic. During the course of the campaign, O'Neill telephoned four area television stations, leaving messages regarding the campaign and the election date, and requesting that they contact him. None did. O'Neill also instructed Morales to contact Fernando Castillo, who was responsible for certain television productions broadcast on one of those stations. Specifically, Castillo was an assistant director for the Information and Service Network (ISN), a local cable and production company which produces programming targeted at a minority audience and which broadcasts such programming over

cable channel 6 during two time periods each week. Neither Castillo nor the Information and Service Network had any commercial relationship with the Union. Castillo had earlier interviewed Morales during the production of a program for a community organization, and had informed Morales that he was interested in taping and gathering information on other events. When Morales called Castillo regarding the election in the instant case, Morales informed him of the date of the election and told him that leafletting would be occurring on the day before the election. Castillo responded that he wanted to be there in order to tape and to attempt to get some interviews. Morales advised Castillo that the time of the shift change was the best time for filming. Morales did not instruct Castillo in any other manner on what or how to tape or whom to interview.

On the afternoon in question Castillo used a borrowed video camera, which he obtained from a community organization, and Morales gave him a ride to and from the site of the Employer's facility. After they arrived, Castillo stationed himself at a corner between the Employer's plant and the employee parking lot near where Morales and O'Neill were distributing campaign flyers. On a fence behind them was a union banner. His equipment consisted of the unmarked video camera and a tripod. At some point, he donned a "Union, Yes" hat, 1 of about 75 such hats handed out during the course of the election campaign. Castillo arrived at the site some time after 3 p.m. and remained until approximately some time after 5 p.m. The shift change occurred between 4:30 and 5:30 p.m.

As background for the interviews he hoped to get with employees, Castillo videotaped the plant, the employees' parking lot, cars moving along the street, cars entering and leaving the parking lot, and employees entering and leaving the plant, including those who passed the handbilling site who were offered leaflets. He unsuccessfully asked two or three employees for interviews, identifying himself as being with the cable station. He also indicated his purpose and affiliation to a couple of employees who asked him directly why they were being filmed. O'Neill, from where he was leafletting employees, also identified Castillo as being from the cable station in response to inquiries from approximately five employees. Including the employees who were nearby when Castillo's purpose was explained, approximately 20 employees out of a work force of about 250 were made aware of his identity.³ Because none of the employees agreed to be interviewed, Castillo never used the 15 minutes of footage

¹All dates are 1990 unless otherwise stated.

²In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Employer's Objections 3 and 6, the only other objections included within the scope of the instant hearing.

³The record does not reveal how many members of the work force were aware of the videotaping. It is possible, therefore, that the 20 employees who were present when Castillo's identity was made clear represented a substantial proportion of those who were aware of the videotaping.

he taped. Instead, he taped over what he had taken without making any copies.

According to Castillo's uncontroverted testimony, he did not campaign for the Petitioner and received no payment from the Petitioner for the videotaping. He also stated that he holds no position with the Union and is not a union member.

The hearing officer found that the actions of the Petitioner and Castillo went beyond merely a newsman filming an event. She noted that Castillo was taken to and from the site by union organizer Morales and that he wore a "Union, Yes" hat while at the site.⁴ Further, she recounted that Castillo stood in front of the Petitioner's banner, and that at least two union organizers were present for the entire time. On this basis, the hearing officer found that the Petitioner had not only condoned Castillo's actions but had contributed to them by furnishing him with the "Union, Yes" hat, thus implying that Castillo was a union member. On this basis, she found that it was reasonable for employees to assume that Castillo was another organizer. She then applied the doctrine of apparent authority and found the Petitioner responsible for Castillo's activity even absent evidence that it initiated or authorized his specific actions. Relying on *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988), in which the Board found objectionable a union agent's use of a video camera, she found that Castillo's videotaping was intimidating and would reasonably tend to interfere with employees' exercise of free choice in an election.

In setting out the legal principles for which Castillo's conduct might be considered attributable to the Union, the hearing officer appropriately described the concept of apparent authority and cited *Dentech Corp.*, 294 NLRB 924, 925 (1989), in which the Board quoted from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 82-83 (1988), stating that:

Apparent authority 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. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, *Agency* 27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must

be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.* at § 8.

Her application of the above concepts to the videotaping in question, however, is flawed for several reasons. The burden of proving any type of agency rests with the party asserting that relationship,⁵ i.e., the Employer in the instant case. Under all the circumstances, we do not agree that the absence of markings connecting Castillo to ISN, coupled with a hat bearing union insignia, provides a sufficient basis for finding that Castillo acted on apparent authority from the Union. The wearing of a hat on which appears a generalized prounion statement and which was widely distributed to employees during the campaign, is not the type of evidence that would significantly tend to establish apparent authority and thereby agency status. To conclude otherwise would mean that anyone who wore an emblem of a party to an election might be deemed an agent of that party. For similar reasons, Castillo's proximity to the union banner and to the admitted Union organizers also does not tend to establish his apparent authority to act as an agent of the Union. As for Morales' driving Castillo to and from the location of the plant, there is no evidence that the employees were aware of that at the time.

Moreover, we note that when the identity of the putative agent was questioned, the principal made clear his separate identity. Thus, both Castillo and O'Neill identified Castillo as being from the cable station or ISN when they were questioned by employees about who he was and his actions. That distinguishes this case from the unusual circumstances in *Pepsi Cola*, supra, in which the individual wielding the camera was a union officer who never offered any explanation to anyone for his videotaping of employees. The Employer, on whom the burden of showing objectionable conduct rests, has not shown that under all the circumstances the Union had acted in a way to cause reasonable employees to believe that Castillo was its agent.

Finally, in assessing Castillo's videotaping under the Board's standard for evaluating third-party conduct, i.e., whether it created a general atmosphere of fear and coercion rendering free choice impossible, we find that his actions cannot reasonably be expected to have had that result, especially since a legitimate explanation for the videotaping was offered to at least 20 employees who asked about it. Consequently we find that Castillo's videotaping does not warrant invalidating the election and we order that a certification of representative issue.

⁴Although the hearing officer found that either O'Neill or Morales provided Castillo with the hat, the record merely indicates that Castillo obtained a hat as they were being passed out by an otherwise unidentified person. There is no evidence which would establish that this person was a union organizer.

⁵*Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for District Union Local 271, United Food and Commercial Workers International Union, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time maintenance, production, and sanitation employees employed by Millard Processing Services, Inc. at its facility located at 10376 Renfro Circle, Omaha, Nebraska, but EXCLUDING all office clerical employees, guards, foremen and supervisors as defined in the Act, and all other employees.

MEMBER RAUDUBAUGH, dissenting.

I dissent. My colleagues in the majority conclude that the Union was not responsible for Castillo's act of videotaping. The evidence shows that a union agent specifically invited Castillo to perform the videotaping, and union agents were standing nearby when Castillo engaged in the videotaping.¹ Thus, the Union specifically approved of, and condoned, the activity in question. In addition, employees would reasonably conclude that Castillo was performing the videotaping at the behest of the Union. During the videotaping, Castillo wore a union hat given to him by the Union. Further, he stood in front of a union banner, and two union organizers stood nearby.

The Union argues that employees would realize that Castillo was acting as an agent for an independent

¹The majority relies on the fact that both Castillo and O'Neill identified Castillo as being from the cable station. However, as noted, this information was conveyed to only 20 out of 240 unit employees. The majority speculates that only these 20 employees were aware of the videotaping. This speculation is unfounded in light of the fact that the Employer operates two shifts and the videotaping was timed to coincide with shift change, i.e., when all employees were coming to or going from work.

cable television station. However, only about 20 employees in a unit of 240 were made aware of this fact. In addition, neither Castillo nor his equipment had any insignia from the television station. Finally, an employee could reasonably conclude that a camera operator who wore a union hat was not acting on behalf of an independent television station. Indeed, Castillo's wearing of such a hat and his proximity to a union banner and union organizers on election eve are wholly inconsistent with the expected behavior of an independent journalist.

Accordingly, I conclude that the Union was responsible for the videotaping by Castillo.² The next issue is whether such conduct is objectionable. The Board has held that such conduct is objectionable.³ Through such conduct, the union obtains a graphic and lasting record of who is receptive to the union's appeal and who is not. In such circumstances, the employees reasonably fear that the union will subsequently rely on that record to reward the former and punish the latter. Further, in the instant case, only a few employees were given a legitimate explanation for the videotaping, i.e., that it was being done by a television journalist and not by the Union. Thus, the great majority of the employees could reasonably conclude that the tapes would be available to the Union, as distinguished from being for the sole use of the television station. In these circumstances, there is an unacceptable risk that employees would be intimidated in the exercise of their Section 7 rights.

²I am not suggesting that a union would be responsible for videotaping by a television station simply because the union invited the station to tape the event. If station personnel tape an event in circumstances which make it clear that they are acting as agents for the station, I would not find union responsibility.

³*Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988); *Mike Yurosek & Son*, 292 NLRB 1074 (1989).