

**AWB Metal, Inc. Division of Magnode Corp. and United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Petitioner.** Case 25-RC-9033

January 22, 1992

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 7, 1991, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 44 for, and 18 against, the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

Contrary to our dissenting colleague, we would not create an exception to *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), which would prohibit misrepresentations disseminated within 24 hours of an election. In *Midland*, the Board returned to a policy that had been in effect during the first 20 years of the Act. Under that policy the Board does not inquire into the truth or falsity of campaign material and does not set aside elections on the basis of misleading campaign statements. The only exception to this rule specified by the Board was that it would set aside an election where a party has used forged documents which render voters unable to recognize propaganda for what it is. *Id.* at 133. Since its announcement 9 years ago, the *Midland* rule has proven to be, as predicted, "a clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results." Thus, we find no reason to tamper with the rule and get back into the business of deciding whether statements alleged as misrepresentations are in fact "substantial departures from the truth," and, if so, are such that they could "reasonably be expected to have a significant impact on the election." *Hollywood Ceramics Co.*, 140 NLRB 221, 224 (1962). If we were once again to entertain such objections, the universe of cases presented would undoubtedly include not only misrepresentations that easily meet such a test but also misrepresentations that (after time-consuming proceedings) are shown to fall short and others that require difficult and delicate line-drawing.

Accordingly, because we agree with the Regional Director that the leaflet distributed by the Petitioner did not involve forgery but was, at most, a misrepre-

sentation of the Employer's wage rates at its unionized plant, we shall, applying *Midland*, overrule the Employer's objections and issue a certification of representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees, including warehouse employees, truck drivers, and group leaders, employed at the Employer's Indianapolis, Indiana facilities located at 4151 W. Washington Street and 90 S. Tibbs; BUT EXCLUDING all office-clerical and professional employees, all draftsmen, all guards and watchmen, all temporary employees, and all supervisors as defined in the Act.

MEMBER RAUDABAUGH, dissenting.

My colleagues conclude, in agreement with the Regional Director, that the Petitioner's election-eve distribution of campaign propaganda overstating the starting wages of employees at the Employer's unionized facility in another State does not warrant setting the instant election aside under the *Midland*<sup>1</sup> rule. While I agree generally with the holding in that case that elections are not to be set aside on the basis of misleading campaign statements, I would not apply it to a situation where the misrepresentation occurs within 24 hours of the opening of the polls.<sup>2</sup> Applying this rule to the instant case, I would invalidate the election and direct a second election.

It is undisputed that less than 24 hours prior to the election, the Petitioner circulated a handbill containing misrepresentations with respect to contractual wage rates recently negotiated between Machinists Local Lodge 1312 and the Employer at its plant in Trenton, Ohio. The handbill directed the employees' attention to the attached pages of the contract, which listed the starting wages for all job classifications in the two-tiered wage system and invited them to compare the "amazing superior level and difference in . . . wages provided at the . . . Ohio plant and your plant at Indianapolis." The Petitioner, however, omitted a page from the contract containing a critical footnote explaining that the starting wages for most of the lower tiered employees were actually 30 percent lower than the wages listed and would not reach the enumerated

<sup>1</sup> *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

<sup>2</sup> The term "misrepresentation" as used herein, means a substantial departure from the truth, such that it may reasonably be expected to have an impact on the election.

amount until after 5 years of employment with the Employer. The Regional Director concluded that this misrepresentation did not involve the use of forged documents—the only ground for setting an election aside under *Midland*. Thus, he recommended overruling the Employer's objections and certifying the Petitioner.

Like the majority, I have no desire to return to the era of *Hollywood Ceramics*<sup>3</sup> when the Board routinely scrutinized and analyzed preelection campaign statements if there was a claim that they included misstatements of fact warranting invalidation of an election. The premise underlying *Hollywood Ceramics* was that Board intervention was necessary to protect employees from their presumed inability to filter out exaggerations or misrepresentations. I agree with the view that employees are intelligent enough to assess the statements of all sides in an organizational campaign. However, this view is valid only if the employees have had the opportunity to assess the statements of both sides. If one side makes a misrepresentation in circumstances where there is no opportunity to reply, the employees never get to hear the other side. They will then go to the polls with the misrepresentation fresh in their minds and with no effective response to it. In such circumstances, I would not permit the offending party to reap the electoral fruits of the misconduct.

I wish to emphasize that my approach does not return to the days of *Hollywood Ceramics*. If the alleged misrepresentation occurs more than 24 hours before the election, the Board need not deal with it. Similarly, the 24-hour rule would not leave ambiguous the issue of whether there was an adequate opportunity to respond. If the statement was made before the 24-hour period, I would hold, as a matter of law, that there was an adequate opportunity to respond. If it was made

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<sup>3</sup>*Hollywood Ceramics Co.*, 140 NLRB 221 (1962).

thereafter, I would hold, as a matter of law, that there was no such opportunity.<sup>4</sup>

In addition, my approach is consistent with, and indeed is an essential part of, the goal of deregulating the content of campaign material. As Professor Bok has explained, the deregulation of the content of speech can be attained to the degree that we maximize the opportunity to respond to that speech.<sup>5</sup> He wrote that “as the opportunity to reply is enhanced, the need for regulating the content of speech tends to diminish.”<sup>6</sup> Similarly, “an adequate opportunity to reply will go far to remove the need for expanding controls over the content of speech.”<sup>7</sup>

In sum, a rule prohibiting the dissemination of written misrepresentations during the 24-hour period before an election will ensure that the contest for the votes of employees will be a fair one and will help facilitate a rational choice by employees for or against union representation. In addition such a rule does not suffer from the over-regulation of *Hollywood Ceramics*.

Applying this rule to the facts of this case, I would find that the Petitioner's misrepresentation of the contractual wage rates of certain of the Employer's unionized work force, which was admittedly circulated in a leaflet during the 24 hours before the election, constituted objectionable conduct warranting the setting aside of the election and the direction of a second election.<sup>8</sup>

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<sup>4</sup>The Board has had considerable success in the implementation of the 24-hour rule of *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953) (no captive-audience speeches within 24 hours of an election). The rule is seldom broken. See Samoff, *NLRB Election: Uncertainty and Certainty*, 117 U. Pa. L. Rev. 228, 248 (1968).

<sup>5</sup>Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 84 (1964).

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid.*

<sup>8</sup>I stress that my proposed rule would prohibit last-minute misrepresentations by both unions and employers alike.