

**Worths Stores Corp. and Midwest Joint Board of
Leather Goods, Plastics & Novelty Workers
Union, AFL-CIO. Case 14-RC-10085.**

30 September 1986

**DECISION AND CERTIFICATION OF
REPRESENTATIVE**

**BY CHAIRMAN DOTSON AND MEMBERS
BABSON AND STEPHENS**

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 15 May 1986, 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 21 for and 13 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and adopts the Regional Director's findings and recommendations only to the extent consistent herewith.¹

The Regional Director recommended that the Employer's Objection 1 be sustained and that the election be set aside based on his finding that an altered facsimile ballot circulated by the Petitioner tended to mislead employees into believing that the Board favored the Petitioner. We disagree.

The document at issue² was prepared by Union Organizer Rosemary Behrman and was mailed to all eligible voters on 29 April 1986. The document was enclosed in envelopes which included the Petitioner's name and return address. At the top of the document, the word "Congratulations" twice appears in bold print and capital letters, forming a semicircle around salutations to each employee and general information regarding secret-ballot elections. Directly below is specific information concerning the date, time, and place of the election; a list of benefits for which employees can bargain; and instructions for employees with questions to call "Rosemary" at the home and work telephone numbers provided. The bottom part of the document consists of a facsimile of a portion of the Board's official ballot. An "X" appears in the "Yes" box, and the Petitioner's name was placed above the box.

In support of its objection, the Employer submitted to the Regional Director the affidavit of an employee witness. The witness stated that she did not retain the envelope in which the document was delivered and could not recall if the envelope had a

return address or identified the Petitioner as the party responsible for distributing the material. The witness further stated that she did not know that "Rosemary" referred to the union organizer. She also stated that because of her unfamiliarity with Board-conducted elections, she assumed that the ballot portion of the document was to be retained for use in the election and was therefore upset that one of the ballot choices had been marked with an "X."

The Petitioner, contending that the document was not misleading, presented the affidavits of Rosemary Behrman, the union organizer, and an employee witness. Behrman stated in her affidavit that the ballot portion of the document was copied from the sample ballot portion of a notice of election used in another case. Behrman also stated that the documents were mailed in union envelopes in order to identify the Petitioner as the party responsible for their distribution. In addition, Behrman stated that she identified herself on the face of the document by referring to her first name and by including both her office and home telephone numbers. She also noted that in a previous union leaflet mailed to eligible voters in early April, she identified herself as a union representative and included the same telephone numbers.

The Petitioner's employee witness stated that she knew the document was sent by the Petitioner, not the Board, because of the Petitioner's name and return address on the envelope and because she recognized the reference to "Rosemary" from the earlier leaflet.

In his report, the Regional Director initially found, pursuant to the Board's analysis in *SDC Investment*, 274 NLRB 557 (1985),³ that the reference to "Rosemary" on the face of the document was insufficient to identify the source of the altered ballot. Moreover, the Regional Director noted that it would not be unreasonable for employees to assume that the invitation to call "Rosemary" was being extended by the Board.

Next, examining the nature and contents of the material, the Regional Director found that the use of a union envelope is not conclusive as to the identity of the party responsible for preparing a document contained in it because the Board rou-

³ *SDC*, above, set forth a two-part analysis to determine whether an altered ballot is likely to give voters the misleading impression that the Board favored one of the parties to the election. Relying on the policy that employees are capable of recognizing campaign propaganda for what it is and evaluating its claims, the Board held that an altered ballot which on its face clearly identifies the party responsible for its preparation is not objectionable. If, however, the source is not clearly identified, the Board stated that it is necessary to examine the nature and contents of the material on a case-by-case basis to determine whether the document is misleading.

¹ In the absence of exceptions thereto, we adopt, pro forma, the Regional Director's recommendation that Objection 2 be overruled

² A copy of the document is attached as Exhibit "A."

tinely prepares official pamphlets for distribution by groups such as labor organizations, employers, and employees. The Regional Director further found that the partisan material and the ballot markings were not sufficiently distinct from the ballot portion of the document so as to preclude the suggestion that the Board endorsed the Petitioner. Rather, the Regional Director found that the additions appeared to be integral parts of a single printed document.

Excepting to the Regional Director's conclusion that the election should be set aside, the Petitioner contended, in substance, that the source of the document was identified on its face, and that the document was not misleading.

In its response to the Petitioner's exceptions, the Employer initially contended that the distributing party was not clearly identified on the face of the document; the Employer stated that the union envelope is extrinsic evidence and therefore cannot be considered under the first portion of the SDC rule, and that the reference to "Rosemary," absent a union title, is insufficient evidence of the document's source. In addition, the Employer maintained that the altered ballot tended to mislead employees into believing that the Board favored the Union because the document "looked official," the partisan markings were not clearly discernible as additions, and the section of the document pertaining to collective bargaining covered many of the same issues addressed in the Board's official "Notice of Election."⁴

In *SDC* and subsequent case law, the Board has applied the two-part analysis of *SDC* to determine whether an altered ballot is misleading. In *Professional Care Centers*, 279 NLRB 814 (1986), the Board adopted the Acting Regional Director's finding that the source of the altered document was clearly identified where the name, address, telephone number, and seal of the petitioner appeared on the face of the document, and where the petitioner was specifically identified as the party responsible for its distribution on the reverse side. Therefore, the Board concluded that the document was not misleading.

On the other hand, where the source of an altered document is not so clear, the Board has examined the nature and contents of the material in order to determine whether voters would be misled into believing that the Board favored one party to the election. The leaflet at issue in *SDC*, above, displayed on one side a handwritten Spanish language facsimile of an official Board ballot. At the bottom of the page in Spanish and in the same handwriting

appeared the message "Remember to vote yes on December 16th"; at the top was a copy of the Board's seal. On the reverse side was an unaltered photocopy of the Board's official sample ballot in English. The Board concluded that the leaflet was misleading because the partisan message appeared to be an integral part of the leaflet, and because the seal and official sample ballot made the document appear official. Further, the Board noted that employees might have assumed that official printed sample ballots were available only in English, and that the Board had prepared the handwritten Spanish ballot for the upcoming election.

Different results were reached, however, in *Rosewood Mfg. Co.*, 278 NLRB 722 (1986), and in *C. J. Krehbiel Co.*, 279 NLRB 855 (1986). In *Rosewood*, the Board concluded that the handwritten message "Vote No" scrawled across a notice of election and an arrow drawn to the "no" box were clearly discernible as partisan additions and were therefore sufficiently distinct from the printed notice and sample ballot so as to preclude the suggestion that the Board endorsed the employer. The document at issue in *C. J. Krehbiel*, above, consisted of reproductions of portions of an administrative law judge's decision, with partisan slogans and cartoons on the same page. The Board determined that on the basis of content, as well as physical size and placement, voters could easily conclude that the cartoons and slogans were not an integral part of the judge's decision, but were partisan additions. In addition, the Board noted that a subsequent leaflet clearly stated that the first leaflet had come from the union, thereby identifying the previous leaflet as union campaign propaganda.

In this case, we agree with the Regional Director the reference to "Rosemary" on the face of the document does not sufficiently identify the Petitioner as the source of the altered ballot. Rosemary's last name was not provided, and her union title or affiliation is not indicated on the document. Nor is there a direct statement indicating that the Petitioner was the preparer of the document. This situation stands in contrast to the specificity of the information provided in *Professional Care Centers*, above, regarding the party responsible for distribution of the altered notice of election.

Therefore, it becomes necessary here to examine the nature and contents of the document. Having done so on the basis of both content and physical placement, as in *C. J. Krehbiel*, above, we do not find that the document had a tendency to mislead employees into believing that the Board favored the Petitioner. On the basis of the content of the partisan additions, it would be unreasonable for an employee to assume that the Board would include

⁴ The Employer stated that it interpreted *SDC* as excluding the use of extrinsic evidence in examining the nature and contents of a document

congratulatory headings and individualized salutations on its official publications. Moreover, even if the document's section on bargaining covers some of the same issues addressed in the Board's notice of election, its partisan stance is readily apparent. Therefore, because the material presents itself as propaganda, we must conclude that employees are capable of evaluating it as such. *SDC*, above.

An examination of the physical appearance of the document further supports our conclusion that the material is not misleading. It is clear that the sample ballot has been cut from another form and added to the partisan material. *Rosewood*, above. Moreover, the document does not appear "official." Thus, the printed material is not centered on the page, markings from a photocopy machine are evident, and the official Board form number is barely legible. Cf. *SDC*, above. Further, the sample ballot is only a partial reproduction, i.e., it does not contain language indicating that it is an official secret ballot of the U.S. Government and posing the critical question for which the election is being held.⁵

In *SDC*, the fact that the complete reproduction of a ballot appeared official was strengthened by the Board's finding that employees could reasonably assume that official printed ballots were available only in English and that foreign language ballots had to be specially prepared by hand when needed. On the other hand, having objectively considered the partial reproduction before us, we must conclude, notwithstanding the statement of the Employer's witness, that employees would not reasonably assume that the Board would provide a premarked partial ballot surrounded by partisan material for use in the election.⁶

⁵ See, e.g., *Stedman Wholesale Distributors*, 203 NLRB 302 (1973). Although predating *SDC*, the Board's analysis in *Stedman* focused on whether the altered ballot would have been likely to mislead voters. Therefore, it is not inconsistent with the *SDC* analysis.

⁶ In this regard, we note the Board's long-established principle that the subjective reactions of employees are irrelevant to the question of wheth-

Finally, the analysis undertaken in *C. J. Krehbiel*, above, indicates that it is appropriate to consider extrinsic evidence in examining the nature and contents of a document to determine if it is misleading. As indicated above, the Petitioner mailed a leaflet to all eligible employees in early April, which identified Rosemary Behrman as a union organizer and included the same phone numbers as are found on the document at issue in this case. Thus, the record indicates that the name "Rosemary" was or should have been familiar to employees. This familiarity, together with the fact that a clearly partisan document was mailed in union envelopes,⁷ further supports our conclusion that the employees would not think that the material came from the Board, or that the Board in any way endorsed the Petitioner.

Accordingly, we overrule Objection 1. Further, since the tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, we shall certify the Petitioner as the collective-bargaining representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Midwest Joint Board of Leather Goods, Plastics & Novelty Workers Union, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All warehouse employees including truckdrivers employed at the Employer's 2055 Walton Road, St. Louis County, Missouri facility, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act.

er there was, in fact, objectionable conduct. The issue is whether the conduct, viewed objectively, warrants setting aside the election. *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), enf'd. 649 F.2d 589 (8th Cir. 1981).

⁷ We note that the document in *C. J. Krehbiel*, was mailed to employees in union envelopes.