

**Jensen Enterprises, Inc. d/b/a Jensen Pre-Cast and Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 631, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO,<sup>1</sup> Petitioner. Case 31-RC-5745**

July 29, 1988

**DECISION AND CERTIFICATION OF REPRESENTATIVE**

**BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON**

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held September 28, 1984, and the hearing officer's report recommending disposition of the objection.<sup>2</sup> The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows six for and two against the Petitioner, with no challenged ballots.

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

The issue in this case is whether the display of an altered Board sample election ballot, under the circumstances presented, warrants setting aside the election. The hearing officer found that the display did not constitute objectionable conduct. The Employer contends in its exceptions that the document likely gave voters the misleading impression that the Board favored the Union. We find no merit to the Employer's contentions and shall overrule the objection.

In *SDC Investment*, 274 NLRB 556 (1985), the Board found that the "crucial question" in resolving issues raising the alteration of a Board sample ballot is whether the ballot in issue "is likely to have given voters the misleading impression that the Board favored one of the parties to the election." 274 NLRB at 557. Under the circumstances of this case, we find insufficient evidence that voters reasonably would be misled.

The facts are not materially in dispute. On September 25, 1984, the Employer's president, Donald Jensen, observed Union Official Michael Straight speaking to unit employees immediately outside the Employer's premises. Jensen was located inside his office and, from a distance of 10 feet, observed

Straight through an office window. Jensen observed Straight displaying to employees a reproduction of an official Board sample ballot that had been altered by the entry of an "X" in the "YES" box. The sample ballot was encased in clear plastic in a looseleaf three-ring binder. There is no evidence that the sample ballot displayed by Straight left his hands at any time or that it contained any other alterations or markings of any kind other than wording customarily found on a Board sample ballot.<sup>3</sup> Further, there is no evidence regarding what Straight may have said to employees while displaying the ballot.

As an initial matter, it may be instructive to emphasize that this case does not involve an altered sample ballot that has been distributed or circulated to employees. Absent any such distribution or circulation, the accompanying potential, or even likelihood, that the document will then be passed along to employees who may not have received it from the originating party is not present.<sup>4</sup>

The paramount factual element of the instant case is that Union Agent Straight did not distribute the altered ballot but merely displayed the document in a notebook, apparently as an instructional device. The document did not leave his hands. Further, there is no evidence what the union agent may have said regarding the display. In these circumstances, we agree with the hearing officer that employees looking at the three-ring binder containing the altered sample ballot, as described by Jensen, could reasonably have concluded that the party holding these materials was the source of the alteration and would not necessarily be given the misleading impression that the Board favored one of the parties to the election. As the objecting party, the Employer retained the evidentiary burden to show that the conduct of the union agent interfered with the election. Where, as here, the altered document did not leave the hands of the union agent, and the evidence shows only the display of the document, we will not presume that employees have been misled by the display of the document alone.

<sup>3</sup> Jensen credibly testified that while he could not read certain "fine print" on the document, he could read bold type printed phrases including "Official Secret Ballot," "United States of America," "National Labor Relations Board," "Mark an 'X' in the square of your choice," and boxes designated "YES" and "NO." Jensen did not identify any wording on the document expressly indicating the voting group or type of election to be conducted and was unable to see whether the sample ballot was specifically that to be used in the instant case.

<sup>4</sup> Because this case does not involve the distribution of an altered ballot, we do not consider it useful, under the facts presented, to apply the two-prong analytical approach set forth in *SDC*. In cases involving distribution, we shall continue to apply the *SDC* methodology in determining whether the altered ballot in issue is likely to have misled employees.

<sup>1</sup> On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

<sup>2</sup> On May 28, 1985, the Board adopted the Regional Director's findings and recommendations overruling the Employer's Objections 1, 3, and 4 and ordering a hearing on Objection 2, now before us in this proceeding.

*SDC* is bottomed on the realistic notion that employees are generally sophisticated enough to recognize that sample ballots containing designated choices often are part and parcel of election campaigns. The interaction between employees and Union Agent Straight displaying a three-ring binder containing a sample ballot is precisely the type of encounter that, standing alone, is likely to be perceived as electioneering by a party to an election and not as an endorsement by the governmental authority overseeing the election. Accordingly, we shall overrule the objection.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 631, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following unit:

All regular full-time and part-time drivers and maintenance and production employees employed by the Employer at its facility located at 3853 Losee Road, North Las Vegas, Nevada, but excluding all other employees, including office clerical employees, salesmen,

confidential employees, administrative employees, managerial employees, professional employees, guards, watchmen and supervisors as defined in the National Labor Relations Act, as amended.

MEMBER JOHANSEN, concurring.

This is an altered ballot case where a union agent did no more than show the ballot to unit employees. The sample did not leave the union agent's hands. That, coupled with the fact that it was encased in plastic in a looseleaf notebook, makes it clear that it was an instructional device and its source was evident. Unlike sample ballots that are distributed to voters, there was little danger here that the ballot's origin would be mistaken.

A rigid and unvarying requirement that the party responsible for preparation of an altered ballot must be indicated on the ballot, as demonstrated by this case, makes no sense. That is particularly so as the Board does not even require any indication that the ballot has, in fact, been altered.<sup>1</sup>

On the facts of this case, the source and the instructional purpose of the alteration were abundantly clear and there is little likelihood of employees being misled. I concur in affirming the hearing officer and certifying the Union as collective-bargaining representative.

<sup>1</sup> Over my dissent. *Professional Care Centers*, 279 NLRB 814 (1986)