

**3-Day Blinds, Inc. and Amalgamated Production Workers, Local 803, International Union of Allied, Novelty and Production Workers, AFL-CIO, Petitioner. Case 21-RC-18533**

July 20, 1990

**DECISION ON REVIEW AND  
DIRECTION OF SECOND ELECTION**

**BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY**

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 21 dated September 15, 1989, an election was conducted by secret ballot on October 13, 1989. Following the election, the parties were furnished a tally of ballots that showed that of the approximately 570 voters, 197 voted for and 306 voted against the Petitioner, with 5 nondeterminative challenged ballots and 8 void ballots.

On October 19, 1989, the Petitioner filed timely objections to conduct affecting the results of the election. Pursuant to National Labor Relations Board Rules and Regulations, the Acting Regional Director conducted an investigation. On December 14, 1989, he issued a Supplemental Decision and Certification of Results of Election in the above-entitled proceeding, in which, among other things, he overruled Petitioner's Objection 1, in which the Petitioner alleged in pertinent part that the Employer had committed objectionable conduct by distributing, within 24 hours of the election, an altered Board ballot that gave employees the impression that the Board favored the Employer. In so doing, the Acting Regional Director found that the sample ballot distributed by the Employer to employees had been sufficiently altered so as to be clearly discernable as to its source, and thus would have appeared to employees to be part of the Employer's campaign material rather than an official communication from the Board.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Acting Regional Director's Supplemental Decision. The Petitioner argued that the altered ballot did not identify its distributor on its face, and improperly gave the impression that the Board favored the Employer. By Order dated March 6, 1990, a panel of the Board<sup>1</sup> granted the Petitioner's request for review with respect to the Acting Regional Director's overruling of Objection 1.

<sup>1</sup> Members Cracraft and Devaney, Chairman Stephens dissenting.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case<sup>2</sup> and finds the following:

The election was held on October 13. On both October 12 and 13, the Employer distributed a facsimile of the sample ballot used on the official Notice of Election.<sup>3</sup> The ballot was an altered photocopy, and had a large handwritten "X" placed in the "NO" box. The sample ballot contained explanatory language at the bottom that stated in both English and Spanish "THIS IS HOW TO MARK YOUR BALLOT TO GIVE THE NEW OWNERS A CHANCE." Other parts of the ballot, including the question on the ballot and various instructions, were also translated into Spanish.<sup>4</sup>

The Employer distributed the facsimile ballot to employees at their work stations. The Employer's president, Art Schumann, and vice president, Roger O'Brien, together with various supervisors and others, visited with individual employees. These corporate officers introduced themselves to the employees as the employees' new owners and distributed the altered ballot, as well as another, unattached "guarantee" handbill.<sup>5</sup> During these meetings, the Employer also asked employees to vote "no" in the election. There is evidence that many employees were approached in this manner.

The Employer's facsimile ballot was produced and distributed to employees on light green paper. Colored paper had been used by both parties on other campaign materials.<sup>6</sup> The ballots used by the Board in conducting the election were also printed on light green paper.

In overruling the Petitioner's objection, the Acting Regional Director concluded that the marked box on the Employer's distributed ballot had been sufficiently altered "so as to be clearly discernable as to its source." He noted that the al-

<sup>2</sup> The Employer's request for oral argument is denied.

<sup>3</sup> A copy of the document is attached as an appendix.

<sup>4</sup> Deleted from the top of the facsimile ballot were the words, "United States of America," "National Labor Relations Board," and "Official Secret Ballot," as well as the United States and National Labor Relations Board seals.

<sup>5</sup> Unlike the altered ballot handbill, the "guarantee" handbill is signed by the Employer's president and vice president. Entitled "3 Day Blinds, Inc. Guarantee," the handbill states, "As new owners of 3 Day Blinds, Inc. we hereby guarantee that no 3 Day Blind Employee will be fired or disciplined by the Company because of the way he or she votes in the election." The handbill is dated, and contains a notary seal and signature.

<sup>6</sup> Prior to the Employer's distribution, the Petitioner distributed a handbill on light green paper that was addressed to the Employer's employees. In the handbill, the Petitioner asked employees to vote "Yes" in the election. The handbill contained the name of the Petitioner, and a large "X" in a hand-drawn "Yes" box. The handbill also contained partisan, pronoun text, and stated that it came from the Petitioner's "Organizing Committee."

tered ballot was "invariably" distributed to employees with material clearly identifying the Employer as the material's source. He thus concluded that the ballot would have appeared to employees to be part of the Employer's campaign material, instead of an official communication from the Board. We disagree.

In *SDC Investment*, 274 NLRB 556 (1985), the Board adopted a two-part analysis to determine whether an altered ballot is objectionable. First, the Board will examine the ballot in order to determine whether the source of the altered document is clearly identified on its face. If the source can be clearly identified on examination of the document itself, then the Board will find that the document is not misleading, as employees will understand that the document emanated from a party rather than from the Board. If, however, the source cannot be clearly identified, the Board will examine the nature and contents of the material in order to determine whether the document has a tendency to mislead employees into believing that the Board favors one party over the other. *Id.* at 557. In examining the nature and contents of a document to determine whether it is misleading, the Board also considers extrinsic evidence. See *Baptist Home For Senior Citizens*, 290 NLRB 1059, 1060 fn 4 (1988).<sup>7</sup> However, parties wishing to avoid the uncertainties inherent in this area may do so by refraining from using ballot reproductions as campaign materials or, if such materials are used, simply by clearly identifying the source of the materials on the face of the documents. *Rosewood Mfg Co.*, 278 NLRB 722 (1986).

In this case, the altered ballot used by the Employer did not indicate the party responsible for the alteration. The Employer's name appears nowhere on the face of the ballot. The reference to "the new owners" on the face of the document does not sufficiently identify the Employer as the source of the altered ballot. There is no direct statement indicating that these owners, or some other official of the Employer, actually prepared the document.<sup>8</sup> See *Worths Stores Corp.*, 281 NLRB

1191, 1192 (1986), compare *Professional Care Centers*, 279 NLRB 814 (1986).

Therefore, we must examine the nature and the contents of the document to determine whether it was likely to give employees the misleading impression that the Board favored the Employer in the election. We first note that on the basis of the content of the partisan additions, an employee would not necessarily believe that the Board did not issue the ballot. The "X" in the "No" box on the ballot suggests that the employees should vote against the Petitioner. The additional language on the handbill and the physical appearance of the document do not make the altered ballot any less misleading. The ballot is displayed prominently at the top of the page, and appears centered. It is marked "Sample," contains official language from the Board's sample ballot on the Notice of Election, and poses the critical question for which the election is being held. It contains instructions to employees on how to mark the ballot, and what to do if the ballot is spoiled, specifically referring to the Board agent.<sup>9</sup> Moreover, the "partisan additions" at the bottom of the handbill are not readily discernible as non-Board statements. The message below the altered ballot, "This Is How to Mark Your Ballot to Give the New Owners a Chance," is no less neutral than the "Remember to vote yes on December 16" message in *SDC*, 274 NLRB at 558. Indeed, the message was not handwritten, but printed in English and Spanish in a format not dissimilar to that on the ballot or on Board Notices of Election. Additionally, there are no clearly partisan additions such as cartoons, slogans, headings, or salutations that would make it unreasonable for employees to believe that the document came from the Board. See *Archer Services*, 298 NLRB No 42 (Apr 30, 1990), compare *C J Krehbiel Co.*, 279 NLRB 855 (1986), summary judgment granted 281 NLRB No 33 (Aug 29, 1986), enfd 844 F.2d 880 (D.C. Cir 1988), *Worths Stores*, supra. For these reasons, the material does not present itself as propaganda, and employees would not be capable of evaluating it as such.<sup>10</sup>

<sup>7</sup> In *Baptist Home for Senior Citizens*, above, and *BIW Employees Federal Credit Union*, 287 NLRB 423 (1987), the Board examined the circumstances of distribution as part of its analysis of the nature and contents of the material. In so doing, the Board relied on statements in *Worths Stores Corp.*, 281 NLRB 1191 (1986), and *C J Krehbiel Co.*, 279 NLRB 855 (1986), indicating that it is appropriate to consider extrinsic evidence in examining the nature and contents of a document to determine if it is misleading. We recognize that *Baptist Home for Senior Citizens* and *BIW Employees Federal Credit Union* have implicitly overruled the majority position in *SDC*, above, to the extent that it appears to preclude examination of the circumstances of distribution. See *SDC*, above at 557 fn 3.

<sup>8</sup> The lack of any indication of the identity of the preparer of the altered ballot stands in stark contrast to the other document distributed by the Employer at the same time. The "guarantee" handbill was signed by the Employer's president and vice president, who specifically stated they

were providing the assurances set forth in the handbill. The "guarantee" handbill was dated, and sworn before a notary, and an official notary seal appears on the "guarantee."

<sup>9</sup> Compare *Worths Stores*, supra at 1195 (citing *Stedman Wholesale Distributors*, 203 NLRB 302 (1973)).

<sup>10</sup> Although the ballot lacks official seals and references to certain other language that is included on official Board ballots, the facsimile ballot here nonetheless is more complete and looks more official than the partial sample ballot in *Worths Stores*. It poses the critical question regarding the election, and contains instructions that appear on the official ballot. The "X" in the "No" box, and the printed message, appear to be part of a complete photocopy handout. And although the Employer may not have been aware of it, the handout was printed on light green paper that was similar to that used by the Board in the election. Thus, employ-

Finally, we find that the circumstances of the distribution here did not clearly serve to identify the Employer as the source of the altered facsimile ballot. The Acting Regional Director noted that the ballot was "invariably" distributed to employees with material clearly identifying the Employer as the material's source, and that all witnesses identified the sample ballots they saw as having been handed out by the Employer. However, that the ballots were handed out under the Employer's auspices as they were distributed with other Employer material does not establish that the Employer was the source of the ballot. The ballot was not stapled or attached to any other campaign material identifying the Employer as the source of the material. Indeed, the evidence establishes that the ballot was handed out separately and distinctly from other material. There is no evidence that the Employer told employees that it had prepared the document. Compare *Baptist Home for Senior Citizens*, above (altered ballot not misleading where it was stapled to a partisan memorandum on the employer's letterhead and most employees received an explanation from the employer that it was the employer who had altered the ballot), and *BIW Employees Federal Credit Union*, 287 NLRB 423 (1987) (altered ballot not misleading where it was stapled to partisan memorandum that was prepared on the employer's stationery and referred to the attached ballot).<sup>11</sup> The Employer also handed out an unat-

tached statement of the Employer's guarantee to employees of nonreprisal for voting. This guarantee handbill prominently featured the Employer's name, the president's and vice president's names and signatures, a date, and a notary public's seal. No such identification appears on the altered ballot. The contrast between this "guarantee" document and the altered ballot may have further contributed to misleading employee perceptions that the altered ballot emanated from the Board. Further, because there is nothing connecting the two documents—neither refers to the other—the distribution logically has nothing to do with who prepared the altered ballot. Simply stated, the distribution of a document by a party does not necessarily mean that the party, rather than the Board, prepared the document. The sample ballot could have been prepared by the Board and only handed out by the party. There is no evidence here to suggest to the contrary, or that employees would have been able to determine that to be the case.<sup>12</sup>

Therefore, contrary to the Acting Regional Director, we sustain the Petitioner's Objection 1. In so doing, we emphasize that parties wishing to avoid the uncertainties in analysis of altered ballot cases where such campaign tactics are attempted may do so by clearly identifying the source of the material on its face. Accordingly, the election here is set aside, and we shall direct a second election.

[Direction of Second Election omitted from publication.]

ees could reasonably believe that the document came from the Board or that the Board favored the Employer. *Stratford Furniture Corp*, 116 NLRB 1721 (1956), *Stedman Wholesale Distributors*, 203 NLRB 302 (1973), and *Triangle Super Dollar Market*, 225 NLRB 403 (1976), are not to the contrary. In each of those cases, an employer reproduced only a small portion of the ballot, i.e., the critical question, the union's name, "Mark an 'X' in the Square of Your Choice," and the "Yes" and "No" boxes. Here, by contrast, the Employer set forth a more complete ballot. More importantly, in each of those cases, the face of the document containing the ballot clearly revealed that the party distributing the ballot had actually prepared the handout involved. Such is not the case here.

<sup>11</sup> The dissent incorrectly suggests that we are distinguishing this case from *Baptist Home* and *BIW* on the basis that the ballot here was not "stapled" to the "guarantee" handbill. As we have made plain, however, our decision rests on the entire circumstances of the distribution here. We particularly note that in both *Baptist Home* and *BIW*, employees generally were made aware, either by the distributing party or accompanying material, that the party, and not the Board, had prepared the altered ballot.

<sup>12</sup> That the Employer's new owners introduced themselves as such to employees at meetings shortly before the distribution of the altered ballots, and that these owners handed out the altered ballot that referred to the "new owners," does not mean the "new owners" prepared the altered ballot, or that employees would necessarily understand that they did.

APPENDIX  
For Certain Employees of  
Para Ciertos Empleados De  
3-DAY BLINDS, INC.

Do you wish to be represented for purposes of collective bargaining by—  
¿Desea usted estar representado para los fines de negociar colectivamente por

**S A M P L E**  
AMICATED PRODUCTION WORKERS  
LOCAL 803, INTERNATIONAL UNION  
OF ALLIED, NOVELTY AND PRODUCTION  
WORKERS, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE  
MARQUESE CON UNA "X" DENTRO DEL CUADRO DE SU SELECCION

<p>YES SI</p> <div style="border: 1px solid black; width: 40px; height: 40px; margin: 0 auto;"></div>	<p>NO NO</p> <div style="border: 1px solid black; width: 40px; height: 40px; margin: 0 auto; position: relative;"> <span style="position: absolute; top: -10px; left: -10px; font-size: 2em;">X</span> </div>
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DO NOT SIGN THIS BALLOT Fold and drop in ballot box PLANS MUNDI-PTINER AND REFERENDUM 20-04  
NO FIRME ESTA PAPELETA. Dóblela y deposítela en la urna electoral

If you spoil this ballot return it to the Board Agent for a new one  
Si usted daña esta papeleta devuélvala al Agente da la Junta y pídale una nueva

**THIS IS HOW TO MARK YOUR BALLOT TO  
GIVE THE NEW OWNERS A CHANCE**

**MARQUE SU BOLETA DE ESTA MANERA Y  
DELE A LOS NUEVOS DUEÑOS UNA OPORTUNIDAD**

**EXHIBIT A**