

Albertson's, Inc. and United Food and Commercial Workers Union, Local Union No. 540.¹ Case 28–RC–6300

August 12, 2005

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered an objection to an election held on November 18, 2004,² and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Decision and Direction of Election issued on August 24.³ The tally of ballots at Store No. 1016 shows five for and three against the Petitioner, with one challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction, and finds that the election at Store No. 1016 must be set aside and a new election held.

We find that the hearing officer erred in overruling the Employer's Objection 1, which alleged that the Union, by its agents and representatives, affected the election by distributing a fake letter, forged on Albertson's letterhead, claiming the existence of a company plan to convert all nonunion stores in various locations, including El Paso, to price-impact Super Saver stores, potentially resulting in job loss and reduction in wages and benefits for current employees. In spite of the Employer's attempt to respond to the forged document before the election, we find insufficient evidence that the employees were able to recognize the forged letter for what it was. We therefore sustain Objection 1 and set aside the election. We find it unnecessary to pass on the hearing officer's recommendations to overrule the Employer's remaining objections.

¹ We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

² All dates are in 2004 unless otherwise indicated.

³ On July 19, the Union petitioned for a single unit comprised of all meat department employees at five Albertson's stores in El Paso, Texas. The Regional Director found the scope of the petitioned-for unit inappropriate, and directed individual elections at the five stores on November 17–19. The Board denied Petitioner's request for review on October 6. The Employer objected only to conduct as it affected the election at Store No. 1016.

I. FACTS

A. Background

Albertson's, whose corporate headquarters is in Boise, Idaho, operates eight grocery stores in El Paso, Texas, under the Albertson's brand name. The Union represents meat department employees in three of these stores, and on July 19, petitioned the Board seeking to represent meat department employees at the five other El Paso stores.

The Union's campaign was spearheaded by Billy Myers, an experienced international organizer for the United Food and Commercial Worker's Union, Region 5, James Heredia, a union representative, and Ruben Gonzales, an Albertson's employee. The Employer's preelection campaign was headed by Amanda Paquet from its labor relations department in Denver, Colorado.

The Union's primary issues during the campaign were job security and benefits. The Union disseminated campaign materials to employees indicating, among other things, that Albertson's had launched a new subsidiary called Extreme, Inc., with stores operating under the banner "Super Saver." In other locations, including Dallas, Albertson's had converted some of its existing Albertson's stores to Super Saver stores. New Super Saver employees generally received reduced hours and benefits compared to those enjoyed by current Albertson's employees. Union campaigners contended that only a vote for the Union would protect El Paso employees from having their stores transformed to Super Saver stores and having their wages, hours, and benefits reduced.

B. The Letter

On or about November 4, an allegedly anonymous fax addressed to union campaign organizer Billy Myers was received at Myers' hotel. The fax was a letter dated January 8, 2004 from "Chris"⁴ to Mike Clawson, purported president of Extreme, Inc.⁵ The originating fax number was from Boise, Idaho, the home of Albertson's corporate headquarters, and the Albertson's name-stamp was on the top of the document.⁶ Myers blacked out the originating fax information except for the Boise area code and the Albertson's name-stamp.

⁴ "Chris" was never identified, and no one named Chris worked at Albertson's corporate headquarters in Boise, the point of origin of the fax.

⁵ The record shows that Extreme, Inc. was incorporated in August 2004 and thus did not exist as of January 8, 2004, the date of the letter. In addition, Mike Clawson was president of Albertson's Northwest Division in January 2004.

⁶ Myers testified that he knew "Al" at Albertson's corporate headquarters, and Al had sent him corporate documents in the past. But Myers testified that Al did not send this letter, and he claimed that he did not know who sent the document.

The letter, printed on what appeared to be Albertson's letterhead, stated the following:⁷

Mike Clawson: 1/08/04

As of to date, our pilot California based Extreme Super Saver stores are operating on schedule with only a few minor glitches. As of our financial goals, we still need to make more cost efficient cuts.

It is very difficult to reach our budget cuts in the stores with the union contracts. As discussed in our meetings we believe that targeting our nonunion stores is mandatory to make the budget cuts required to establish our financial goal. Therefore I list several States and cities in which would be prime candidates and due to this area being so financially deprived and the stores are not represented by the Union.

6 Stores in Dallas, TX
 9 Oklahoma City, OK
 8 Stores in El Paso, TX
 3 Stores in Baton Rouge, LA
 1 Corpus Christi, TX
 3 Lufkin, TX
 3 Midland, TX

This cities above have the greatest potential to have larger profit margins than our California stores.

We also observe the importance of stressing our program to under price our competition, "Wal-Mart" in the cities listed.

We will continue to keep updating you as we continue to make progress in our Extreme program.

Thanks,
 Chris

CC:
 Larry Johnson
 Jennifer Vroman
 Terry Lawrence

Myers testified that he often received documents from Albertson's corporate office, but he did not know who sent this letter. Although Myers stated that he believed the letter was genuine, and he claimed that he continued to believe it was genuine throughout the campaign and thereafter, the hearing officer did not credit Myers' testimony regarding his beliefs about the authenticity of the letter.⁸

⁷ The text of the letter is reproduced as received, including spelling and grammatical errors.

⁸ Although the hearing officer found Myers to be a generally credible witness, he did not believe that someone with Myers' campaign experience and knowledge of the Company would not, at the very least,

Within a few days after Myers received the letter, he showed it to four "key" employees who were active in the Union's campaign and asked them if they knew anything about the letter or its contents: Yolanda Sandoval, a meat department employee at Store No. 1016; Yvonne Mena, a meat department employee at Store No. 999; "Sylvia," an employee working at one of the unionized stores in El Paso; and "Fernie," an employee at Store No. 1016 but not in the meat department, and thus, not eligible to vote in the election. Myers acknowledged that he gave copies of the letter to Mena and Fernie because they asked for copies, but he also stated that he told them not to distribute the letter. Myers also showed the letter to Eloy Pdragon, a meat department employee at Store No. 999, on a home visit before the election.

In addition to these five employees to whom Myers showed the letter, Carlos Aldrete and Enrica Jimenez, both meatcutters at Store No. 1016, testified that union organizers, Heredia and Gonzales, showed them copies of the letter during home visits before the election.⁹

Although the record is not clear as to the extent of the letter's distribution at the five stores, there was evidence that other employees saw the letter before the election. Mena testified that she showed the letter to her supervisor and to all meat department employees at Store No. 999, and Myers testified that other employees told him they had seen the letter.

In response to the circulating document, company representative Paquet sent a letter to local Union President Johnny Rodriguez dated November 12 stating, with specific supporting proof, that the letter was a forgery.¹⁰ Paquet demanded that the Union cease distributing the fake document, notify all eligible voters that the document was fake and the information false, and inform the Company of any information the Union had on who prepared the document. The Union did not respond to or comply with Paquet's letter.

question the letter's authenticity. There were no exceptions to the hearing officer's credibility findings.

⁹ Aldrete testified that he saw the letter 2 or 3 weeks before the election. Jimenez stated that he believed he saw the letter during a home visit on November 16, 2 days before the election and after the Company's November 12 rebuttal letter to the Union, in which the Employer demanded that the Union cease using the forged document in its campaign. Jimenez, however, was not certain about the date of the home visit.

¹⁰ Paquet listed numerous factual errors in the letter. For example, on January 8, 2004, the date of the letter, Extreme, Inc. did not exist, and Mike Clawson, to whom the letter is addressed, was president of Albertson's Northwest Division. In addition, the letter named stores in several cities where Albertson's has no stores, the California Super Saver stores are union and are not affiliated with Extreme, Inc., and three of the eight El Paso stores are union.

In addition to sending the rebuttal letter to the Union, the Company held mandatory meetings before the election with all employees at each of the five El Paso stores. The Company informed the employees that the letter was fake, pointed out the factual errors in the letter, and made available copies of the rebuttal letter sent to the Union.

C. The Election

Individual elections were held at the five El Paso stores from November 17 to 19. The Union lost elections at four stores. At Store No. 1016, the vote was five for and three against the Union, with one challenged ballot. The Employer objected to the outcome of this election, charging among other things that the forged letter tainted the election and prevented employees from exercising free choice.

II. HEARING OFFICER'S REPORT

The hearing officer recommended overruling the Employer's objection to the forged document. The hearing officer rejected the Employer's contention, based on *Mt. Carmel Medical Center*, 306 NLRB 1060 (1992), that the distribution of a forged document during an election campaign was a per se violation requiring that the election be set aside. Instead, the question to be addressed is whether voters were "unable to recognize propaganda for what it was." *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982).

The hearing officer found that the letter on its face was an obvious forgery. Thus, a reasonable Albertson's employee would have recognized the letter for what it was, i.e., campaign propaganda favoring the Union, prepared by someone other than Albertson's. In addition, the hearing officer found that the Company's response was sufficient to expose the forgery and allow employees to recognize the letter for what it was.

For the reasons set forth below, we agree that *Mt. Carmel* did not establish a per se rule requiring that an election be set aside because of a forged document. But we disagree with the hearing officer that a reasonable Albertson's employee, under these circumstances, would have been able to recognize the forgery for what it was. Thus, we sustain the Employer's Objection 1, set aside the election, and order a new election.

III. ANALYSIS

The Board announced the standard for evaluating preelection propaganda, including misrepresentations and forged documents, in *Midland National*, 263 NLRB at 133:

[W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of mis-

leading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. [Footnotes omitted.]

After *Midland National*, anonymous or falsely attributed campaign propaganda has been treated as "the necessary but not sufficient threshold for a case by case examination to determine whether a voter can 'recognize propaganda for what it is.'" *North American Directory Corp.*, 939 F.2d 74, 79 (3d Cir. 1991) (quoting *Midland National*, above).

A. The Board Has Not Adopted a Per Se Rule for Forged Campaign Documents

Despite the Board's acknowledged case-by-case analysis of alleged campaign forgeries, the Employer here argues that in *Mt. Carmel*, above, the Board adopted a per se rule to set aside an election in cases where a forged document is distributed before the election. In *Mt. Carmel*, a forged LM-2 report¹¹ was distributed to employees before the election. The Board, in a brief decision, set aside the election. The Board found that because of the nature of the forgery at issue, i.e., the union's financial disclosures, the document was not, on its face, an obviously recognizable forgery. Moreover, distributing a true copy of the LM-2 report was not likely to expose the forgery for what it was because employees would not be able to distinguish the forged document from the genuine one. Thus, relying on *Midland National*, the Board set aside the election because, under the circumstances, employees were unable to recognize the forgery for what it was.

We agree with the hearing officer that *Mt. Carmel* did not create a per se rule for forgeries. We further decline the Employer's request that the Board reject its established analysis and adopt a per se rule requiring that an election be set aside when forgeries are involved.

B. Employer's Exception to Hearing Officer's Finding that Employees Should Have Recognized Forgery for What It Was

The Employer argues that even in the absence of a per se rule for campaign forgeries, the election at Store No. 1016 should be set aside because Albertson's employees

¹¹ Under the Labor-Management Reporting and Disclosure Act (LMRDA), labor unions must file annual financial disclosures with the Office of Labor-Management Standards. An LM-2 is one such document.

were unable to recognize the forgery for what it was. We find merit to this exception.

First, the Employer argues that a reasonable employee would not have recognized the letter, on its face, as an obvious forgery. We agree. The hearing officer found that the letter was clearly fake, relying among other things on the following errors: it was poorly drafted, with grammatical and spelling errors; the CEO's name (Larry Johnston) was misspelled; the letter referred to stores in cities where Albertson's did not have any stores; the letter is dated January 8, 2004, and refers to "Extreme stores," but Extreme stores did not exist until August 2004; the addressee, Mike Clawson, was not affiliated with Extreme, Inc. in January 2004; and California Super Saver stores were unionized.

The hearing officer found that these material errors of fact would be "immediately evident to employees." We do not share this view. For example, we would not expect the average employee to know the correct spelling of the CEO's name, who Mike Clawson was, in what cities Albertson's had stores, or the representation status of Albertson's California stores. Moreover, union organizer Myers did not redact the Albertson's name-stamp or the Boise, Idaho area code from the top of the fax, both of which added to the document's authentic appearance. In short, the record does not support a finding that the letter was obviously recognizable as a forgery to a reasonable Albertson's employee.¹²

Second, the hearing officer, relying primarily on *Heinz Pet Products v. NLRB*, 97-5058, 97-5212, 1998 WL 449771 (6th Cir. 1998), found that the Employer's response to the forged letter, including meetings with employees before the election and distributing to employees the Employer's rebuttal letter to the union, was enough to expose the letter as a forgery. We find that the facts in this case are distinguishable from *Heinz Pet Products*, and in the particular circumstances of this case, we find that the Employer's response to the forged letter was insufficient to repair the damage that the letter did to employee free choice in the election.

In *Heinz Pet Products*, an anonymous, forged letter falsely impugning the employer's campaign tactics appeared at the homes of two employees. One of the employees brought the letter to the union's headquarters. The next day, the forged letter was all over the employer's plant, but there was no evidence implicating the union or indicating who was responsible for distributing the letter. The only activity directly linking the union

¹² There is no inconsistency between this conclusion and the finding that union organizer Myers could not reasonably believe that the document was real. Myers, unlike the employee, was an experienced union agent who was familiar with the Employer.

with the letter's distribution was a home visit where a union agent showed the letter to two employees. The employer in *Heinz Pet Products* objected to the election results both on the grounds of union agent distribution of the letter and on the grounds of third-party distribution, and the court treated the two issues separately. With regard to union agent distribution, the court noted that the union was responsible for showing the letter to two employees only, and thus the effect was *de minimis* and did not alter the election's outcome. *Id.* at 2.¹³ With regard to distribution of the letter by third parties, the court correctly held that misconduct by third parties is given less weight than misconduct by a party. *Id.* at 3. Thus, with regard to the third-party distribution, the court held that the employer's efforts to counter the letter, including widespread distribution of a letter to a union officer exposing the forgery, as well as a series of employer speeches declaring the letter to be a forgery, would have reasonably led employees to believe that the letter was not authentic and thus mitigated its effect on their free choice. *Id.* at 4.

In this case, on the other hand, we are primarily concerned only with distribution by union agents. Union organizer Myers testified that he gave copies of the forged Albertson's letter to two "key" employees, Mena and Fernie. Mena testified that she showed the letter to her supervisor and to all of the employees in the meat section at her store. In addition, union agents Myers, Heredia, and Gonzales showed the letter to at least three employees during home visits. Thus, unlike the unattributed distribution of the forgery in *Heinz Pet Products*, here the Union, through its agents, was directly responsible for disseminating the forged document to a significant number of employees.¹⁴ It therefore cannot be said that the distribution by the union agents was *de minimis*.

Although the Employer's efforts to dispel the effects of the forgery cannot be discounted, because we are dealing with distribution by a party, we must look more closely at all the circumstances to determine if those efforts would reasonably have caused employees to assess the forged letter for what it was, and thus recognize it as campaign propaganda. In the circumstances of this case, we find that this standard has not been met.

First and foremost, the hearing officer did not credit Myers' claim that he believed the letter was genuine. He found that Myers, an experienced union organizer who was familiar with Albertson's operations, should have

¹³ Over 700 employees voted in the election, and the union won by 31 votes. Thus, showing the forgery to two employees could not have affected the election's outcome.

¹⁴ The hearing officer found that the letter was distributed by union agents, and the Union did not dispute the finding.

been suspicious, at the very least, of the letter and its authenticity.¹⁵ Nevertheless, Myers himself initiated the distribution of the letter, and union agents continued to distribute the letter on home visits.

Moreover, the Union never acknowledged or advised unit employees that the letter was a forgery, even after the Employer asked it to do so.¹⁶ The Union's choice to remain silent, despite receiving clear evidence that the letter was not authentic, unnecessarily added to employees' confusion, especially because a simple union acknowledgement of the forgery would have helped to dispel such uncertainties. Even though the Employer met with employees and claimed that the letter was a forgery, a reasonable employee could have been confused by the authentic-looking document in the face of the Union's silence, and may have doubted the Employer's attempt to reveal that the letter and its contents were false.

In sum, employees were being told by the Employer that the letter was a fake, but the Union was distributing the letter to the employees as real.¹⁷ Faced with conflicting views from the two party antagonists, the employees were "unable to recognize propaganda for what it [wa]s." *Midland National*, 263 NLRB at 133. The Union could have cleared up the confusion, but chose not to do so.

The ultimate question, as *Midland National* makes clear, is whether employees were able—under all the circumstances—to recognize the forged document for what it was. One such circumstance that must be taken into account is the Employer's attempts to reveal the letter as a forgery. In this case, however, in disagreement with the hearing officer, we find that those attempts were insufficient to mitigate the effects that the forged letter had on employee free choice. The nature and contents of the letter, the Union's role in its distribution, and the Un-

ion's decision to remain silent rather than inform employees of the forgery all prevented employees from reasonably recognizing the letter as a forgery, despite the Employer's efforts. As such, in the particular circumstances of this case,¹⁸ we believe this letter is the kind of forgery that, according to *Midland National*, warrants the Board's intervention. We therefore sustain the Employer's Objection 1, set aside the election, and direct a second election as set forth below.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the notice of second election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Food and Commercial Workers Union, Local Union No. 540.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the notice of second election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director

¹⁵ For example, the letter states that the Company was targeting eight stores in El Paso. Myers, the union organizer, certainly knew that three of the El Paso stores were union. Indeed, he testified that he met with Sylvia, an employee from one of the union stores in El Paso, and showed her the letter.

¹⁶ Cf. *Kitchen Fresh, Inc.*, 716 F.2d 351, 355 (6th Cir. 1983), cited in *Heinz Pet Products* for the proposition that "[p]ublic disavowal is required where the union or its agent is responsible for the misconduct." *Heinz* above at 4 fn. 6. The *Heinz* court further stated, "Where the union did not engage in misconduct, a union's silence is at most a factor to consider in determining whether employees reasonably could recognize the forged documents as campaign propaganda." *Id.* In *Kitchen Fresh*, the court found that an employee who circulated false rumors was not a union agent, and the union disavowed the rumors, so the rumors and the union's conduct were not grounds to set aside the election. In contrast, the hearing officer in the present case found that Myers and other union organizers were union agents, and the Union failed to disavow the forged letter.

¹⁷ We recognize that the Union told Mena and Fernie not to further distribute the letter. However, the cat was out of the bag, and the Union took no steps to safeguard against further distribution.

¹⁸ We also consider the closeness of the election. Here the election vote was five for and three against the Union, so a change in just one vote could have affected the outcome.

shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be

grounds for setting aside the election whenever proper objections are filed.