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**1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation & Nursing Center and 1199 SEIU United Healthcare Workers East, New Jersey Region, Petitioner.**  
Case 22–RC–13139

August 26, 2011

DECISION AND CERTIFICATION OF  
REPRESENTATIVE

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER  
AND HAYES

The National Labor Relations Board, by a three-member panel,<sup>1</sup> has considered objections to an election held on September 2, 2010, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 38 ballots for and 28 against the Petitioner, with 5 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs,<sup>2</sup> has adopted the hearing officer's findings<sup>3</sup> and recommendations, and finds that a certification of representative should be issued.

In support of its Objection 1, the Employer contended that the Union distributed a flyer during the critical period containing statements purportedly made by employees that they did not, in fact, either make or authorize. The hearing officer recommended overruling the objection. For the reasons stated by the hearing officer, and those that follow, we agree with and adopt the hearing officer's recommendation.

Explaining to employees that the Union was making a campaign flyer, the Union obtained signed release forms from employees willing to be photographed and/or videotaped and to provide statements of support for the Union. Employees who signed the release forms authorized the Union "to use pictures made of me and

comments made by me on this date in video tapes, printed material, digital and online media, advertisements, and any other materials." Two questions on the release form asked employees how having a union would (1) "improve your life and/or the life of your family" and (2) "help you provide better care [for your patients]."

After collecting signed releases from approximately 49 employees in a proposed bargaining unit of 73, the Union then published a campaign flyer containing statements based on the answers in the release forms and on the prior statements employees made in campaign videos expressing their desire for a union. The cover of the flyer displayed the words "We're Voting Yes for 1199SEIU!" between two group photographs of employees. These words were repeated on the back of the flyer, surrounded by individual photographs and employee statements. The flyer included statements from approximately 48 individual employees, and approximately 25 of the statements included the words "I'm voting yes," although none of the employees expressly authorized the Union to use those specific words.

The Employer objected to the Union's use of the words "I'm/We're voting yes" in quotes on the flyer. It claims that the "voting yes" quotes were unauthorized misrepresentations that deceived voters and that should require a second election.

Under the well-established standard for evaluating misrepresentation in campaign propaganda, an election can be set aside on the basis of misleading campaign statements only if a party has used "forged documents which render the voters unable to recognize propaganda for what it is." *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982). Under the Sixth Circuit's broader rule, an election may also be set aside "where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected." *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984). There was no forgery here and voters could easily identify the flyer at issue as campaign propaganda. Nor, for the reasons we explain below, was there any pervasive misrepresentation or deception so artful that employees were unable to separate truth from untruth. In fact, we agree with the hearing officer that the Union had received sufficient evidence of the employees' support that its insertion of the words "I'm voting yes" into employees' statements expressing their desire for a union did not amount to misrepresentation, regardless of whether employees expressly authorized

<sup>1</sup> Member Pearce is recused and did not participate in this case.

<sup>2</sup> The Employer filed 14 objections, but withdrew Objections 8 and 14 at the close of the hearing. The Employer excepted to the hearing officer's recommendations to overrule Objections 1-7 and 11-13. In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule Objections 9 and 10.

<sup>3</sup> The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

attribution of those specific words to them. See *Gormac Custom Mfg.*, 335 NLRB 1192, 1200–1201 (2001).

Our dissenting colleague would set aside the election. He cites the Board’s statement in *BFI Waste Services*, 343 NLRB 254 (2004), that it did not “condone the creation and attribution of quotes to employees, at least where the union makes no prepublication effort to verify that the quotes fairly represent[ed] the views of the quoted employees.” *Id.* at 254 fn. 2. But the Union’s actions here render the concerns expressed by the *BFI* majority inapposite. Indeed, the Union made precisely the sort of prepublication effort to verify mentioned there. The Union asked all the quoted employees to state their reasons for supporting union representation and for permission to use their names, images, and statements in campaign literature. The campaign flyer included statements received in the answers supplied in the signed release forms. And many of the employees quoted in the flyer also appeared in a campaign video sincerely stating their desire for a union. Based on these interactions, the Union reasonably believed that each of the named employees was planning to vote “yes” for representation. To suggest that by including the phrase “we’re voting yes” or “I’m voting yes” in quotes the Union engaged in “pervasive misrepresentation,” “artful deception,” or even misrepresentation at all is not supported by these facts. The Union did exactly what each of the employees who signed the release form would have understood the Union was going to do—it used the employees’ names, images, and words in an effort to create a persuasive piece of campaign literature.

In turn, no reasonable employee reading the Union’s flyer would think that all the listed employees actually got together and literally said, “We’re voting yes.” That language appears on the cover and back of the flyer and is not attributed to any specific employee. A reasonable reader would have understood those words, as well as the repeated phrase, “I’m voting yes,” as characterizing the pro-union sentiments of the named employees as a whole.<sup>4</sup> There was no “artful deception” of the reader: that characterization was accurate and was verified by the Union. Surely, readers could “recognize the propaganda ‘for what it is.’” *Midland*, supra, 263 NLRB at 131. And, as there was no misrepresentation, necessarily there was no “pervasive misrepresentation” under *Van Dorn*.<sup>5</sup>

<sup>4</sup> There was simply no “deception of all other unit employees about the extent of support for the Petitioner” as suggested in the dissent.

<sup>5</sup> Nor can we understand the dissent’s concerns that the employees whose names and pictures appeared in the flyer might somehow “feel compelled to support the union,” when they had expressly authorized such use and expressed their support for representation, and that their

The dissent’s approach reflects a view of the ability of voters to assess campaign propaganda that was decisively rejected in *Midland*, and it would impose an unrealistic burden on unions’ production of campaign literature and certainly a burden more rigorous than *BFI* envisioned. It is in tension, moreover, with the objective of the *Midland* rule to “insure the certainty and finality of election results, and minimize unwarranted and dilatory claims attacking those results.” *Midland*, supra, 263 NLRB at 131. For all those reasons, we decline to find that the Union’s distribution of the flyer requires us to set aside the election.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for 1199 SEIU United Healthcare Workers East, New Jersey Region, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. August 26, 2011

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Wilma B. Liebman, Chairman

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Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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right “to cast a private election ballot had been violated,” when they indisputably cast their ballot in private and remained free at any time to announce to their fellow employees that they had changed their minds and no longer supported representation.

MEMBER HAYES, dissenting.

Contrary to my colleagues and the hearing officer, I would sustain the Employer's Objection 1. In my view, the Petitioner's unauthorized addition of the words "I'm voting yes" or "We're voting yes" to images and quotations of 25 employees in its campaign flyer interfered with employee free choice in the election.<sup>1</sup>

The Board has stated that it does not "condone the creation and attribution of quotes to employees, at least where the union makes no prepublication effort to verify that the quotes fairly represent the views of the quoted employees." *BFI Waste Services*, 343 NLRB 254, 254 fn. 2 (2004). This sort of conduct impedes the laboratory conditions sought in Board elections. "An employee who has merely signed a petition may feel compelled to support the union after seeing his signature or photograph reproduced on a poster. A slickly produced mass-mailing that includes ghost-written employee quotations may deceptively induce other employees to support the union." *Id.* at 254 (Member Meisburg, concurring).

The Board did not set aside the election in *BFI* because it concluded that the union's misrepresentations were not "pervasive" or "artful deceptions." In this instance, they were both. The leaflets with the fabricated quotes were mailed to all eligible voters. In a unit of 73 voters, 25 employees who signed releases approving the use of their images in the Petitioner's campaign literature were quoted as stating the equivalent to "I'm/We're Voting Yes," but none of them made those statements in their releases or elsewhere. In contrast to *BFI*, in which two employees were told that a quote would be prepared for them, the numerous employees here were not told that such statements would be made on their behalf in the Petitioner's flyer. As a consequence, their statutory right to refrain from making that public declaration and to cast a private election ballot has been violated. Further, unless the employees took the difficult step of publicly recanting the flyer's message—another intrusion on their right to refrain from disclosure of their vote on representation—the inaccuracy of that message remained as an artful deception of all other unit employees about the extent of support for the Petitioner.

My colleagues rely on *Midland National Life Insurance Co.*, 263 NLRB 127, 131 (1982), to conclude that readers of the flyers "could recognize the propaganda for what it is." They reach that conclusion by layering speculation upon speculation: the Petitioner "reasonably believed" that the named employees were planning to vote "yes" for representation; the named

employees "would have understood" that the Petitioner was going to use their information as it did; and no reasonable reader of the flyer "would think" that the named employees actually said, "We're voting yes," and instead "would have understood" that the quoted words accurately characterized the pro-union sentiments of the named employees.

I am not persuaded by such speculation. More importantly, I do not agree that it is unrealistically burdensome for a union, in preparing campaign literature, to verify the authorization of quoted material that publicly purports to reveal the voting preference of employees on a matter as to which they have a statutory right to privacy. In my view, consistent with *BFI*, this intrusive and misleading form of campaign propaganda is beyond the scope of what *Midland* permits. That is, not only does the attribution of unauthorized voting pledges to certain employees mislead others in the voting unit, a *Midland* misrepresentation issue, but it also directly impinges on the identified voters' Section 7 right to refrain from declaring their position on a representation issue prior to voting in a private Board election, which is not a matter addressed by *Midland*. When pervasive, as it was in this case, such conduct is objectionable. I would therefore sustain the Employer's Objection 1 and set aside the election results.

Dated, Washington, D.C. August 26, 2011

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Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

<sup>1</sup> I find no need to pass on the Employer's other objections.