

Enterprise Leasing Company—Southeast, LLC and International Brotherhood of Teamsters, Local 391, Petitioner. Case 11–RC–006746

December 29, 2011

DECISION AND CERTIFICATION
OF REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

The National Labor Relations Board has considered objections to an election held on December 16 and 17, 2010, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 44 for and 41 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, has adopted the hearing officer's findings¹ and recommendations, and finds that a certification of representative should be issued.²

Employer Objection 4 involves the Petitioner Union's use of employee Roberto Henriquez' photograph on a campaign flyer without his permission. Contrary to our dissenting colleague, we adopt the hearing officer's recommendation to overrule this objection.

In support of its objection, the Employer relied on the following stipulated facts. Employee and union supporter Chafik Omerani took Henriquez' photograph in a food court at a mall near their workplace. The Union included his photograph in a campaign flyer that it circulated a few days before the election. On one side, the flyer contained photographs of Henriquez and seven other bargaining unit employees surrounding the words, "Yes, Everybody can make the right choice!! To end Unfair treatment & Unfair pay!!" The other side of the flyer had

¹ 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.

Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), we have accepted the Employer's September 30, 2011 postbrief letter calling our attention to the Board's decision in *Somerset Valley Rehab & Nursing Center*, 357 NLRB 736 (2011).

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule the Employer's Objection 2, 3, and 5. Employer's Objection 1 alleged that a union organizer made a threat to a procompany employee shortly before the election began. Employer's Objection 6 asserted that inclement weather had prevented a determinative number of employees from voting. We adopt the hearing officer's recommendations to overrule those objections for the reasons stated in the report.

a longer "Dear Colleagues" note that encouraged employees to allow the Union to be their "voice" for better pay, better benefits and better treatment. Both sides of the flyer were marked, "URGENT."

There is no credited evidence that Henriquez objected to the Union's use of his photograph in the campaign flyer or that he opposed the Union. The parties stipulated only that Henriquez did not authorize the use of his photograph. Henriquez was present and available to testify at the hearing, but the Employer did not call him as a witness despite the hearing officer's express invitation to do so. As the objecting party, the Employer has the burden of providing evidence in support of its objections. *Park Chevrolet-Geo*, 308 NLRB 1010, 1010 fn. 1 (1992); NLRB Casehandling Manual (Part Two) Representation Proceedings Section 11392.10.

Assuming that a reasonable reader of the flyer would understand it to suggest that Henriquez had authorized use of his image, such a misrepresentation would not be objectionable. 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).

The Board has applied the *Midland* standard in ruling on election objections alleging that a union has circulated campaign literature using the names or signatures of employees or attributing quotes to them without first receiving their consent. See, e.g., *Somerset Valley Rehab & Nursing Center*, 357 NLRB 736 (2011); *BFI Waste Services*, 343 NLRB 254, 254 fn. 2 (2004); *Champaign Residential Services*, 325 NLRB 687, 687 (1998); *Findlay Industries*, 323 NLRB 766, 766 fn. 2 (1997).

Applying *Midland*, we agree with the hearing officer's recommendation to overrule Objection 4. First, the Employer has not presented any evidence that the Union's flyer misrepresented Henriquez' support for the Union. At most, the evidence suggests that the Union implicitly misrepresented that Henriquez authorized the use of his image in the flyer. Second, there was no forgery involved, voters could easily identify the flyer as union campaign propaganda, and any misrepresentation was

not pervasive. Thus, under either *Midland* or *Van Dorn*, the objection should be overruled.

In excepting to the hearing officer's recommendation, the Employer relies on only two cases: *Randell Warehouse of Arizona*, 347 NLRB 591 (2006), and *Sprain Brook Manor Nursing Home*, 348 NLRB 851 (2006). Both cases are readily distinguishable. The issue in *Randell Warehouse* was whether a union's unexplained photographing of employees' protected activity was objectionable.³ Here, there is no evidence that Henriquez was engaged in protected activity when Omerani photographed him, or that Omerani failed to explain the purpose of his photographing. Moreover, the Employer's objection is not to the taking of Henriquez' photograph, but to its unauthorized use. Finally, while the Employer asserts that the photograph was taken "by a Union adherent," it does not allege that the photographer was an agent of the Union, and the holding in *Randell Warehouse* applies only to union actions, not to the actions of union supporters.⁴

In *Sprain Brook*, supra, the Employer objected to the results of an election on the ground that the union photographed employees without their consent and used the photographs in its campaign materials. The Board declined to find the photographing objectionable under *Randell Warehouse* because it was not clear who took the photographs. *Id.* at 851. Similarly, as stated above, the Employer here does not argue and did not present evidence demonstrating that the photographer was an agent of the Union. Further, while the Board also observed in *Sprain Brook* that the union had obtained signed consent forms from employees prior to using their photographs, it did not hold that the use of employee photographs without such consent is per se objectionable.

Our dissenting colleague suggests that the holding in *Allegheny Ludlum*, supra, supports the Employer's objection. Contrary to our dissenting colleague, we find that *Allegheny Ludlum* is inapposite.

The question actually decided in *Allegheny Ludlum* was whether the employer unlawfully polled its employees by systematically soliciting them to participate in a

campaign video. Employers and unions, however, are held to different standards in evaluating the coerciveness of polling; although employer polling is generally assumed to be coercive and therefore unlawful, union polling is generally recognized as lawful activity. See *Springfield Hospital*, 281 NLRB 643, 692–693 (1986) (finding that union's survey of employees' union sentiments did not constitute objectionable conduct), *enfd.* 899 F.2d 1305 (2d Cir. 1990); *J.C. Penney Food Dept.*, 195 NLRB 921, 924 fn. 4 (1972) (distinguishing polling by a union from polling by an employer), *enfd.* 82 LRRM 2173 (7th Cir. 1972); see also *Maremont Corp. v. NLRB*, 177 F.3d 573 (6th Cir. 1999); *Louis-Allis Co. v. NLRB*, 463 F.2d 512, 517 (7th Cir. 1972) (an "employer occupies a far different position with regard to the coercive impact of its action upon employees than does a union."); *Mercy-Memorial Hospital*, 279 NLRB 360, 360 fn. 1 (1986) (citing *Louis-Allis*, and rejecting dissent's contention of a "double standard," in finding lawful a union's request that its members advise it of coworkers' promanagement activities), *enfd.* 836 F.2d 1022 (6th Cir. 1988). After all, unions are required to poll in order to obtain the showing of interest that is a prerequisite to a Board-supervised election.

The Board and the courts have thus recognized in a wide variety of contexts that it is vastly different for an employee to face the choice of asking his or her employer to remove his or her image from campaign propaganda or suffer its unauthorized use than it is for an employee to make the request of a union that does not and may never represent the employees in collective bargaining, and that is dependent on the support of employees to achieve that status. "An employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant." *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969).

We therefore disagree with our colleague's statement that "[a]lthough *Allegheny Ludlum* involved employer conduct, its principles apply with equal force to conduct on the part of unions." While *Allegheny Ludlum* established rules governing employers' systematic efforts to use photographs of employees in campaign literature, it did not address the issue here—whether a union, which is permitted to question employees about their support for representation, engages in objectionable conduct if it solicits employees to have their photographs appear in campaign literature but includes the image of a single employee who did not so consent.

³ In *Randell Warehouse*, an unidentified individual (later shown to be a union agent) openly but without explanation took photographs of employees who, while leaving their employer's facility, accepted or declined to accept proffered union literature. The Board majority held that, in those circumstances, the photographing had a reasonable tendency to intimidate the affected employees.

⁴ Our dissenting colleague mistakenly suggests that one of our bases for distinguishing *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001), *enfd.* 301 F. 3d 167 (3d Cir. 2002), is the lack of evidence that the photographer who took Henriquez' photograph was a union agent. As discussed above, we rely on the lack of such evidence of agency only to further distinguish *Randell Warehouse* and cases following it.

Our dissenting colleague relies on the following language in *Allegheny Ludlum*:

except in cases where an employee has volunteered to be included in a campaign videotape as set forth above, an employer violates employees' Section 7 rights by disseminating to employees a videotape which indicates, explicitly or implicitly, that a specific employee or employees either support or oppose unionization.

Id. at 744. Only if this dicta in *Allegheny Ludlum* applies to unions as well as employers, despite the different rules applicable to their polling, and establishes a per se rule applicable without regard to surrounding circumstances does it support our colleague's position in this case. Here, where the record demonstrates that the Union has a policy of not using employees' images without their consent,⁵ the Union used the image of a single employee—Henriquez—without his authorization, and there is no evidence that Henriquez did not support the Union, that he asked the Union to cease using his image, or even that he did not want the Union to use his image, we do not think that *Allegheny Ludlum* supports such a broad per se rule inconsistent with our prior decisions in *Champaign Residential*, *Findlay Industries*, *BFI Waste*, and *Somerset Valley*.⁶

We also disagree with our dissenting colleague's reliance on *Sony Corp. of America*, 313 NLRB 420 (1993). In that case, the Board adopted the judge's conclusion that the employer violated Section 8(a)(1) by using photographs of 140 employees, including union stewards, in a videotape made and shown without the employees' consent to support a decertification campaign. The judge found that in response to questions from employees about the employer's purpose in taking the photographs, the employer did not respond truthfully and, in fact, intentionally misrepresented its purpose. The judge characterized the employer's actions as "trickery" that "coerced prounion employees into giving an outward manifestation of support to the decertification effort." Id. at 429. Thus, *Sony* is distinguishable from the instant case because (1) the employer made affirmative and intentional misrepresentations to photographed employees; (2) the employer tricked nearly all of the 140 unit employees into allowing it to photograph them and use the photo-

⁵ While the dissent questions the existence of such a policy, there was uncontroverted testimony from one employee that a union official told her that she "would have to sign an authorization, consent for [her] picture to be used, and if [she] didn't, it would not be used." While the policy may not have been in writing, the statement of the union official represents the policy of the Union.

⁶ While the dissent suggests that we are applying a different standard to unions than to employers, we do not reach the question of whether the dicta in *Allegheny Ludlum* relied on in the dissent would apply here absent the factors cited above.

graphs in its videotape, and (3) many of those employees vehemently opposed the employer's use of their image in the videotape. Here, in contrast, there was no evidence that Henriquez opposed the Union or even that he was neutral, that he opposed the Union's use of his photograph, or that the Union somehow tricked him into having his photograph taken. Further, the employer's misconduct in *Sony* was far more widespread than that alleged in this case. Accordingly, *Sony* is inapposite.

For these reasons, we adopt the hearing officer's recommendation and overrule Objection. 4.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Teamsters, Local 391, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All hourly full-time and regular part-time greeter, exit booth agents, counter representatives, rental agents, handheld agents, bus drivers, service agents, customer service representatives, push/pullers and mechanics employed by the Employer at its Alamo and National car rental facility located at its Raleigh-Durham airport facility; but excluding all salaried employees, technical employees, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

MEMBER HAYES, dissenting in part.

Section 7 of the Act protects individual employees' rights to choose whether, and to what extent, to become involved in a representation campaign. The Board has held that this principle prohibits an employer from using an employee's photograph in campaign material in a manner that reasonably tends to indicate the employee's position on union representation, without the employee's consent. See, e.g., *Allegheny Ludlum Corp*, 333 NLRB 734, 745 (2001), *enfd.* 301 F.3d 167 (3d Cir. 2002). This case squarely poses the issue of whether this Section 7 free-choice principle applies to unions as well. In my view, it plainly does, and my colleagues have failed to articulate a valid justification for holding otherwise. Accordingly, contrary to my colleagues and the hearing officer, I would find that the Union's use, in a pro-union campaign document, of employee Roberto Henriquez' photograph without his consent was an unwarranted infringement of his Section 7 rights which reasonably tended to interfere with his free choice in this election

and that of his coworkers and constituted objectionable conduct.¹

In *Allegheny Ludlum Corp*, supra, the Board explained that Section 7 protects not only an employee's right to participate or to refrain from participation in election campaigns, but also the "right to choose the *degree* to which he or she wishes to express support for, or opposition to, union representation." 333 NLRB at 740 (emphasis in original). Thus, the fact that an employee expresses support (or opposition) in one form, signing a card or petition, for example, does not deprive the employee of the right to refrain from other activity. *Id.* In light of these rights, the use of an employee's image in campaign propaganda presents unique considerations because it "serves as a permanent record of the participating employee's opposition to [or support for] the union." *Id.* An employee cannot subsequently change his or her mind without revealing the change of heart and making an affirmative request that the image be removed. *Id.* Because of these characteristics, which apply with equal force to photographs, the Board established special rules requiring informed consent for both employee participation in campaign videotapes and the use of stock employee images in such campaign propaganda. *Id.* at 743–744.² The use of such images, absent informed consent, constitutes unlawful coercion. *Id.* at 744 ("[A]n employer violates employees' Section 7 rights by disseminating to employees [campaign propaganda] which indicates, explicitly or implicitly, that a specific employee or employees either support or oppose unionization" unless the employees have volunteered to be included.).

The Union's flyer violated these principles. It indisputably indicated that Henriquez supported unionization, and portrayed him as encouraging other employees to support the Union as well. There is no evidence that Henriquez volunteered to play this role in the Union's campaign.³ To the contrary, the parties have stipulated that he did not authorize this use of his photograph.⁴ As

¹ I agree with my colleagues' adoption of the remainder of the hearing officer's recommendations.

² The adoption of special rules applicable to the use of employees' images in campaign propaganda is consistent with the Board's approach to unexplained photographing of employees generally, conduct that is treated as inherently coercive whether engaged in by employers or unions. See *Randell Warehouse of Arizona*, 347 NLRB 591 (2006).

³ My colleagues state that there is no credited evidence that Henriquez objected to the Union's use of his photograph in the flyer. That point, on which the majority places undue emphasis, is irrelevant under the *Allegheny Ludlum* analysis discussed above. Rather the Union must show consent and it did not do so.

⁴ The majority states more than once that there is no showing that the photographer was a union agent. The photographer's agency status is irrelevant. The Union indisputably used the photograph in its campaign

a result, its use in this manner violated his Section 7 rights.⁵

Further, this conduct reasonably tended to interfere with employee choice in the election. First, by publicly identifying Henriquez as a union supporter without his authorization, the flyer inhibited him from showing support for the other side either in conversations with his coworkers or even when casting his ballot. *Allegheny Ludlum*, supra, 333 NLRB at 744 (employee would be required to "suffer the embarrassment of having to explain why [he] changed his mind[.]"). See also *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277–278 (1973) (employees improperly induced to show support for union may "feel obliged to carry through on their stated intention" when casting their ballot); *Sony Corp. of America*, 313 NLRB 420, 428 (1993) (using employees' photographs in anti-union video without their informed consent interfered with their right to support union and would deter them from later speaking out in support of union). Second, the Union's unauthorized use of Henriquez' photograph interfered with the free choice of other unit employees as well. See *Savair*, 414 U.S. at 277 (improperly procured "outward manifestation" of employee support paints a false picture of employee support and thereby convinces other employees to vote for union); *Sony*, 313 NLRB at 429 (same).

Although *Allegheny Ludlum* involved employer conduct, its principles apply with equal force to conduct on the part of unions. Publicly portraying an employee as supporting the union, without his or her consent, has precisely the same impact on the employee and others in the unit as the portrayal of an employee as opposing repre-

material and the question is whether that use was objectionable. Indeed, my colleagues themselves acknowledge that "the Employer's objection is not to the taking of Henriquez' photograph but to its unauthorized use." The agency status of the photographer plays no part in that analysis.

And while this point is also irrelevant, my colleagues state that the Union had a policy of not using employees' images without their consent. The hearing officer made no mention of this alleged policy, and the majority's finding that one exists apparently is based on the hearsay testimony of employee Gloria Mayo. In any event, the Union clearly violated this alleged policy because the parties stipulated that Henriquez' photograph was used without his consent.

⁵ My colleagues state that the Board has applied *Midland National* rather than *Allegheny Ludlum* to union misrepresentations of employee support, but none of the cases they cite, including the Board's recent ruling in *Somerset Valley Rehab & Nursing Center*, 357 NLRB No. 71 (2011), in which I dissented, dealt with the issue presented here, namely the unauthorized use of an employee's image in campaign propaganda that indicates the employee either supports or opposes unionization. That issue was presented in *Allegheny Ludlum*, and it is presented here. Thus, for the purpose of deciding this case, there is no need to consider whether *Midland National* is the proper standard against which to measure representations of an employee's position on unionization by means other than photographs or videotapes.

sentation. In both cases, the employee so depicted will be deterred from taking a different position and his or her coworkers will be influenced to adopt the same view.⁶ As the Supreme Court observed in *Savair*, 414 U.S. at 278: “Any procedure requiring a ‘fair’ election must honor the rights of those who oppose a union as well as those who favor it.” Consistent with this principle, “the Board uses the same general standard in evaluating the conduct of the parties in the election setting: whether the conduct reasonably tended to interfere with the employees’ free and uncoerced choice in the election.” *Randell Warehouse of Arizona*, supra, 347 NLRB at 594–598.⁷

Disregarding the important Section 7 rights at stake here, the majority analyzes this case as though it were a garden variety election propaganda case, citing to *Midland National Life Insurance Co.*, 263 NLRB 127, 133

⁶ My colleagues find *Allegheny Ludlum* inapposite by calling it a “polling” case, but they are clearly in error because the Board stated there that it was undertaking to articulate a clear statement of the principles governing “. . . the circumstances in which an employer may lawfully include visual images of employees in campaign presentations.” 333 NLRB at 734. This is the issue here also, albeit involving a union’s use of visual images, and, for the reasons described above, the same principles apply to both employers and unions.

The majority also errs in claiming that *Sony Corp. of America* is inapposite by simply citing to facts in *Sony* that are not present in this case. My colleagues cannot dispute, however, that the legal issue in both cases is the same, i.e., the effect of the use of employees’ visual images in campaign material “without the employees’ informed consent.” 313 NLRB at 430. The result in both cases is likewise the same—such conduct is prohibited.

⁷ Citing *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 738 (1961), the Board held in *Randell* that “the legislative history of the Taft-Hartley Act indicates that Congress intended similar standards to apply to like kinds of employer and union intimidation.” 347 NLRB at 595.

(1982), which deals with alleged misrepresentations in campaign propaganda. This case, however, involves the exercise and protection of fundamental Section 7 rights: the individual employee’s right to take an open position in an election campaign or to refrain from doing so, and the individual employee’s right to determine whether, and to what extent, he or she wishes to participate in an election campaign in other ways. Such Section 7 rights are individual decisionmaking prerogatives rather than factual statements, the accuracy of which can be assessed by employees themselves.

Moreover, the Board has made clear that the *Midland National* standard should not apply where the propaganda incorporates employees’ images because of the unique characteristics of the photographic medium, which has consequences for employees that “are appreciably more permanent.” Instead, for the reasons explained in *Allegheny Ludlum*, supra, the Board sets aside the election unless the employee volunteered to be included. See *Sony*, supra, 313 NLRB at 432. I can think of no valid justification for the Board to apply different standards to a union’s unauthorized use of an employee’s image in campaign propaganda, and my colleagues offer none.

Nearly 40 years ago, the Supreme Court in *Savair* took a dim view of the Board’s effort to allow conduct on the part of a union that was forbidden to an employer and chided the Board for ignoring “the realities of the situation.” 414 U.S. at 499. Those same realities preclude continued application of the deferential *Midland National* standard solely for unions in cases like these. Because my colleagues have chosen a different path, I respectfully dissent.