

**Mattera Litho, Inc. and Graphic Arts International
Union Local 285, AFL-CIO, Petitioner. Case
5-RC-11406**

24 August 1983

**DECISION AND CERTIFICATION OF
RESULTS OF ELECTION**

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

Pursuant to a Stipulation for Certification Upon Consent Election executed by the parties and approved by the Acting Regional Director for Region 5, an election by secret ballot was conducted on 6 March 1981. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 23 eligible voters, 10 cast ballots for, and 11 against, Petitioner. There was one challenged ballot, a number insufficient to affect the results of the election. Thereafter, Petitioner filed timely objections to conduct affecting the results of the election. On 28 April 1981 the Acting Regional Director served upon the parties his Report on Objections, finding merit in paragraphs one and two of Objection 5,¹ recommending that a new election be directed, and further recommending that a hearing be held with respect to Objections 1, 2, 3, and 4 in the event the Board did not adopt his recommendation with respect to Objection 5. On 17 September 1981 the Board issued a Decision and Order Directing Hearing,² finding that paragraphs one and two of Objection 5, in addition to Objections 1, 2, 3, and 4, raised substantial and material factual issues which could best be resolved by a hearing.

Pursuant to the direction of the Board a hearing was held on 5 and 6 November 1981 before Hearing Officer Harvey A. Holzman. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. On 19 November 1981 the Hearing Officer issued and served on the parties his Report on Objections in which he recommended that Petitioner's Objections 1, 2, and 4 be overruled and that Objections 3 and 5 be sustained, and that the election conducted on 6 March 1981 be set aside and a new election directed. Thereafter, the Employer filed timely exceptions to the Hearing Officer's report.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by Mattera Litho, at its 5124 Frolich Lane, Cheverly, Maryland location, but excluding salespersons, professional employees, office clerical employees, guards and supervisors as defined in the Act.

5. The Board has considered the Hearing Officer's report, the Employer's exceptions and brief, and the entire record in this case, and hereby adopts the Hearing Officer's report only to the extent consistent herewith.³

With respect to Petitioner's Objection 3, the Hearing Officer found that on 4 March 1981, 2 days prior to the election, a debate between the Employer's president, Rudy Mattera, and Union Representative Tony Gonzalez was held on company property with all bargaining unit employees in attendance. At one point during the course of this meeting, Mattera referred to certain "lies" concerning an incident in which he allegedly became angry while in the employee locker room by himself and proceeded to slam locker doors and kick boxes of trash around. Mattera stated that he did not know who had spread this story, whereupon employee Richard Kana interjected that he was the person who had done so. The ensuing events are the subject of conflicting testimony, but the Hearing Officer concluded, based on his credibility resolutions, that Mattera reacted to Kana's acknowledgement by moving a few feet from his speaker's position to confront Kana directly, calling him a liar and a "son of a bitch," and making some kind of statement that he would "get" Kana. The Hearing Officer concluded that because this confrontation went beyond mere name-calling and included a threat which was overheard by some unit employees, the election must be set aside. While we adopt the Hearing Officer's factual findings based on his credibility resolutions, we disagree that this incident requires that the election be set aside.

¹ The Acting Regional Director approved Petitioner's request to withdraw paragraph three of Objection 5.

² Not included in the bound volumes of Board cases.

³ In the absence of exceptions thereto, we adopt, *pro forma*, the Hearing Officer's recommendation that Petitioner's Objections 1, 2, and 4 be overruled.

In evaluating the possible impact of this incident on unit employees we consider it crucial that, as the Hearing Officer himself found, the confrontation was a personal one which did not relate in any way to the issue of unionization or Petitioner's campaign, nor was it directed to Gonzalez, Petitioner's representative at the debate. While we do not condone the sort of verbal excess engaged in by Mattera, in the circumstances of this case it does not rise to the level of objectionable conduct. Mattera's ire was directed at Kana in a brief and passing episode related only to Kana's admission that he had been the one who disseminated what Mattera perceived to be a lie and a personal affront. The fact that Mattera's heated words were spoken at the debate, with unit employees present, does not in itself render the conduct objectionable, since it could not reasonably be expected to have a significant impact on the election, particularly in light of the fact that the campaign was otherwise free from objectionable conduct.⁴

Objection 5 alleges that the Employer misrepresented Petitioner's expenditures on behalf of its members by mischaracterizing portions of the Labor Organization Annual Report, form LM-2, which Petitioner filed with the Department of Labor pursuant to the provisions of the Labor Management Reporting and Disclosure Act of 1959.⁵ Thus, the Employer distributed materials, with reprints of Petitioner's form LM-2 attached, which state that, out of several hundred thousand dollars in collected dues, Petitioner spent only \$479 "on behalf of individual members," compared to much larger sums for "entertainment" and other expenses. The Hearing Officer, after analyzing both Petitioner's form LM-2 and the instructions provided by the Department of Labor for completing that form, concluded that the Employer's materials substantially misrepresented the amounts of money expended by Petitioner on behalf of the employees it represents.

Subsequent to the Hearing Officer's issuance of his report, the Board issued its decision in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), which announced our return to the rule of *Shopping Kart Food Market*, 228 NLRB 1311 (1977). Applying the *Shopping Kart* test to the facts of *Midland National*, which included a misrepresentation virtually identical to that alleged by Petitioner herein, we concluded that as the objection alleged

⁴ Cf. *Central Engineering and Construction Co.*, 200 NLRB 558 (1972), in which a supervisor threatened that he would "knock [an employee's] ass off" if the employee repeated the accusation that the supervisor had lied. The Board adopted the administrative law judge's conclusion that the conduct was not unlawful because the threat was made in the context of a personal dispute, and was not directed to the fact that the employee had filed charges with the Board or given testimony at a Board hearing.

⁵ 29 U.S.C.A. § 401, *et seq.*

nothing more than misrepresentations in materials which were clearly identifiable by employees as campaign propaganda, it would be overruled. For the reasons set forth in *Midland National*, we reach the same result here, and Petitioner's Objection 5 is overruled.⁶ Accordingly, as the tally of ballots shows that Petitioner failed to receive a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Graphic Arts International Union, Local 285, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

MEMBER JENKINS, dissenting:

Once again my colleagues have permitted an election result to stand even though an elaborately conceived fraud was injected into the campaign at the last minute. As in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the Employer herein distributed a leaflet commenting upon the form LM-2 financial report, which Petitioner and its International submitted to the U.S. Department of Labor. The leaflet emphasized the low dollar amounts entered on line 71, which reflects cash disbursements "on behalf of individual members," and contrasted these figures with the amounts paid to union officials and the amounts spent for "entertainment." However, the leaflet conveniently failed to mention that the Labor Department's instructions for completing line 71 provide that all "normal operating expenses" are excluded from disbursements "on behalf of individual member." By omitting this explanation, the Employer disguised the fact that normal operating expenses are also incurred for the benefit of all members, and it seriously distorted the manner in which Petitioner and its International spend union members' money. In my view, the Employer's leaflet constitutes a serious misrepresentation which, beyond doubt, had a significant impact on the election.

Thus, for the reasons set forth in the dissent in *Midland National*, I would adhere to the flexible

⁶ Our dissenting colleague's description of the Employer's leaflet as "an elaborately conceived fraud" finds no more support on the record here than did a similar allegation made by the dissent in *Midland National*, *supra*; see fn. 26 therein. There is no showing that the Employer "disguised" anything, and a leaflet which arguably misrepresents a factual matter is not transformed into a fraud merely because our dissenting colleague labels it as such.

and balanced standard of *Hollywood Ceramics*,⁷ and I would adopt the Hearing Officer's recommendation that Petitioner's Objection 5 be sustained, that

⁷ *Hollywood Ceramics Co.*, 140 NLRB 221 (1962). See also *General Knit of California*, 239 NLRB 619 (1978).

the election be set aside, and that a second election be directed.⁸

⁸ Because I would set the election aside based on Objection 5, I find it unnecessary to reach the question of whether Petitioner's Objection 3 should also be sustained.