Wells Fargo Guard Services, a Division of Baker Protective Services, Inc. *and* United Security Guard Guild. Cases 22-CA-9502 and 22-RC-7744

16 March 1984

SECOND SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 14 April 1983 Administrative Law Judge Edwin H. Bennett issued the attached Supplemental Decision,[1] finding that the Board's previous certification of the Guild as bargaining representative is valid, and recommending affirmance of the Board's Decision and Order (252 NLRB 55). Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response thereto.

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

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent herewith.

The facts reveal that Respondent's Objection 2 to the underlying election which resulted in the Guild's certification alleges that Guild President Harry Martin's letter announcement that he was resigning his office and affiliation with the Guild constituted a material misrepresentation inasmuch as he continued to exert effective control, albeit as a "consultant," over the Union. The materiality of that representation is demonstrated by the Guild's subsequent campaign letter indicating that certain employees had failed to vote (for the Guild) in the first election[2] because of Respondent's "cleverly devised smear campaign leveled at Martin" and that Respondent had escaped being unionized because its campaign had succeeded. In its remand for an evidentiary hearing on the said objection, the Third Circuit determined that it was error for the Regional Director to overrule the aforesaid objection on the basis of an ex parte investigation inasmuch as Martin was himself a campaign issue in the first election, and thus the disputed factual question of whether he retained control of the Guild raised a "substantial and material" issue of fact which, the court stated, entitled the objecting party to an evidentiary hearing. The court further stated that Martin's "representations about this departure from the Guild were, if false, material misrepresentations which would warrant setting aside the second election."[3]

The judge found, and we agree, that the credited evidence adduced at the remand hearing plainly shows, inter alia, that Martin continued to retain complete control over the Guild throughout the course of the Union's campaign, second election, certification, and demand for bargaining with the Respondent. We likewise agree with the judge's conclusion that, based on his factual findings, the court would set the second election aside. However, he did not do so based on the fact that, following the court's remand, the Board issued its Decision in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), in which it stated that it will no longer probe into the truth or falsity of the parties' campaign statements and not set elections aside on the basis of misleading campaign statements. The judge noted that the Board decided in *Midland* to apply that law retroactively "to all pending cases in whatever stage." He further found, based on an analysis of analogous misrepresentation cases handed down during the period of changing principles of law in this area, that *Midland* is properly applicable to the instant case, and that the conduct herein does not fall within the narrow exceptions to the *Midland* rule. Accordingly, he found no basis for setting the second election aside, and recommended affirmance of the Board's prior refusal-to-bargain Decision and Order.

Contrary to the judge, we interpret the above-quoted language in the Third Circuit's decision, which we previously accepted as the law of this case, as granting no discretion in the Board but to set aside the election on the finding made by the judge, that Martin's "representations about his departure from the Guild" were material misrepresentations. We shall therefore revoke our prior Decision and Order (in 252 NLRB 55) and dismiss the complaint herein. We shall further vacate the certification issued in Case 22-RC-7744, set aside the second election held on 17 and 30 April 1979, and remand that case to the Regional Director for the

[1] This proceeding arises from the 15 December 1981 decision of the United States Court of Appeals for the Third Circuit (659 F.2d 363) denying enforcement of the Board's summary judgment refusal-to-bargain finding against the Respondent (252 NLRB 55 (1980)) and remanding for an evidentiary hearing on one of Respondent's objections to the underlying representation proceeding in Case 22-RC-7744. On 18 March 1982 the Board issued a Supplemental Decision and Order (260 NLRB 1051), in which it accepted the court remand as the law of the case, and ordered the instant hearing on that objection.

[2] The Guild lost the first election (62 to 54) by an 8-vote margin, and won the second election (67 to 59).

[3] 659 F.2d at 371.

purpose of conducting a third election at a time he deems appropriate.[4]

ORDER

It is hereby ordered that the prior Decision (252 NLRB 55) in Case 22-CA-9502 be revoked and the complaint in that case be dismissed.

IT IS FURTHER ORDERED that the certification issued in Case 22-RC-7744 be vacated and that the election conducted in that case on 17 and 30 April 1979 be set aside.

IT IS FURTHER ORDERED that Case 22-RC-7744 be remanded to the Regional Director for Region 22 for the purpose of conducting a third election at such time as the Regional Director deems appropriate.

[Direction of Third Election omitted from publication.]

[4] In light of our acceptance of the court's opinion as the law of the case, we have consolidated the representation case with the unfair labor practice proceeding for the purpose of dismissing the complaint and remanding the representation case to the Regional Director.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge. The hearing in this matter was conducted on June 28 and 29, 1982, in Newark, New Jersey, pursuant to a Supplemental Decision and Order of the Board (260 NLRB 1051) which issued on March 19, 1982, accepting a decision by the United States Court of Appeals for the Third Circuit which had remanded the proceeding to the Board for an evidentiary hearing with respect to certain objections filed by the Respondent to an election which had been conducted in April 1979.[1] Although the lengthy procedural history of this case has been documented in prior opinions by the Board and the court, a brief summary of that record would serve to focus on the issues involved in the immediate proceeding.

The case originated on December 28, 1978, when United Security Guard Guild, herein called the Union, filed a petition for an election in a unit of security guards employed by Wells Fargo Guard Services, a division of Baker Protective Services, Inc., herein called the Employer or Respondent, at its Lawrenceville, New Jersey location. Following a hearing on that petition, the Regional Director for Region 22 issued a decision on January 22, 1979, in which, inter alia, he directed that an election be conducted in that unit, rejecting the Employer's contention that the Union was disqualified by Section 9(b)(3) of the Act from serving as a bargaining representative of a unit of guards because it was affiliated with a nonguard union. Respondent failed to request review by the Board of that decision and a mail ballot election was conducted in February 1979.

On March 6, 1979, the Union, which had lost that election, filed a finding sustained by the Board upon a request for review filed by the Employer. As a consequence, a second election was conducted in April 1979, which this time was won by the Union. In May of that year the Employer filed its objections to that second election asserting, inter alia, that during the campaign leading to the second election the Union falsely informed the voters that its president (Harry J. Martin) had severed all relationship to it, an untruth compounded by a further false statement concerning the identity of the individuals who would be responsible for the functioning of the Union in Martin's place. Those objections were investigated by the Regional Director without a hearing. In July 1979 he issued a decision finding no merit to the Employer's objections and certified the Union as the bargaining representative. Thereafter, the Board rejected Respondent's request for a review of that decision. The Employer then refused to bargain with the Union which conduct led to the issuance of a bargaining order[2] following a hearing on an unfair labor practice complaint at which the Employer sought, unsuccessfully, to litigate its objections to the second election relating to the Union's alleged misrepresentations. The Employer refused to comply with that Board Order leading to a review of the Board decision by the Court of Appeals for the Third Circuit.

In September 1981, the court of appeals issued its decision (reported at 108 LRRM 244) in which, inter alia, it held that it had been error for the Regional Director not to hold a hearing on the Employer's objection to the second election. It was concluded that if the Union had asserted falsely that Martin had relinquished control of the Guild and also had falsely claimed that the Guild was being directed by a group of influential citizens, then material misrepresentations had been made warranting another election pursuant to the rule governing campaign misrepresentations set forth in *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), readopted in *General Knit of California*, 239 NLRB 619 (1978). The court also dealt with Respondent's 9(b)(3) claim by stating, at footnote 9 of its decision, "new evidence on the 9(b)(3) issue may materialize during the hearing on Mr. Martin's role in the Guild or during the preparation for that hearing. This opinion should in no way be construed as precluding additional exploration of the 9(b)(3) issue by the Board if the need to do so arises."

Such was the posture of the case at the time of the hearing conducted in the instant proceeding. However, following the hearing the Board reevaluated the rule of *Hollywood Ceramics* and decided, in *Midland Life Insurance Co.*, 263 NLRB 127 (1982), to abandon that doctrine, holding instead that elections no longer would be set aside on the basis of misleading campaign statements.[3] Further, and of critical significance here, the

[1] Respondent's objection to the hearing on remand being held pursuant to Sec. 10 of the Act, rather than Sec. 9, is groundless. *Mosey Mfg. Co.*, 255 NLRB 552 (1981).

[2] *Wells Fargo Guard Services*, 252 NLRB 55 (1980).

[3] In doing so, the Board returned to the doctrine set forth in its 1977 decision, *Shopping Kart Food Market*, 228 NLRB 1311 (1977), which had overruled *Hollywood Ceramics*.

Board decided to give retroactive application to the new rule and apply it "to all pending cases in whatever stage." *Midland Life*, supra at 133 fn. 24. The Board carved out a narrow exception to the policy of nonintervention in campaign falsehoods by announcing that it would continue to "intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland Life*, supra at 133, and "when an official Board document has been altered in such a way as to indicate an endorsement by the Board of a party to the election." Id. at fn. 25. From the foregoing it is clear that there are the following distinct issues in this case.

1. Did Harry J. Martin, in fact, remain in control of the Union despite the Union's announcement to the voters that he had resigned his office?

2. Did the Union falsely state that a number of influential citizens had offered to serve, and were serving, as a board of trustees for the Union?

3. Can the policy of retroactive application of the *Midland Life* rule apply in the instant matter where there has been an intervening decision by a court of appeals?

4. If the *Midland Life* rule now controls the case rather than the *Hollywood Ceramics* rule, and if the misrepresentations were made, do they fall within the general rule of *Midland* that elections will not be set aside on the basis of misleading campaign statements, or within the narrow exceptions to that rule?

5. In any event, was new evidence presented warranting a finding that the Union is affiliated with a nonguard union and therefore disqualified from representing the unit herein by virtue of Section 9(b)(3) of the Act?

FINDINGS OF FACT

A. *The Martin Resignation*

The first election was set aside by order of the Regional Director on March 23, 1979, at which time a second mail-ballot election was scheduled for the period April 17 through 30, 1979. About March 31, 1979, Martin, the undisputed guiding force in the Union, sent a letter to the unit employees stating that he had resigned the presidency, a post he had held since the Union's inception, and further that he had severed all connection with the Union.[4] Martin wrote it was the last letter he would send and it was with deep regret that his resignation had been tendered in the best interest of the employees because for him to remain in office would taint what he had "fought so hard these many months to achieve for you." Martin testified that his resignation was prompted by his desire to remove himself as a campaign issue, a reference to Respondent having injected into the campaign Martin's "past performance as a young hoodlum in the streets of Philadelphia." Martin viewed this emphasis on his record as extraneous to vital election issues.

The same letter also stated that "some of the state's finest and influential people" had offered to serve as a board of trustees, implying they would fill the gap created by Martin's departure. A second letter issued shortly thereafter in which Martin's past service was extolled but, the employees were told, the Union now was "newer and stronger" "since the resignation of Harry Martin." The letter stated further that "the Board and members of the committee" together would continue "the fight for your future benefits."[5]

That Martin resigned his title as president of the Union is undisputed. But that act, however, merely begins the inquiry and, as it turns out, is of only peripheral interest because, as Martin himself acknowledged, titles were of little consequence in determining who exercised real control of the Union. At the time Martin proclaimed his resignation he had served as president without salary. The affairs of the Union were conducted out of his home and he was assisted by his wife who served as the Union's secretary-treasurer. The records of the Union were maintained in his home as was the Union's phone. The only other union officer was Patrick McCullagh who became president on Martin's resignation. Joseph Cocula, a personal friend of McCullagh, aided Martin in his organizing efforts by performing duties of an undefined and specified nature. While Martin sought to create the impression that decisions and policies of the Union, prior to his purported resignation, were made on a collegial basis after consultation between himself and the other union officials, I find that in all respects Martin was the controlling, and the sole authoritative, voice for the Union.

Both McCullagh and Cocula worked only part time for the Union and neither of them had any union organizing experience. McCullagh remained as president until June 1979 when he resigned because he had no time for union business. Cocula replaced him as president, having apparently first replaced McCullagh as a vice president when Martin resigned. A literal parade of officers moved through the Union's ranks for it appears that one Harry Rouse served in some capacity between March and September 1979, leaving when he failed to perform the unspecified duties assigned to him. According to Cocula, Rouse was not attending to union affairs and had done nothing "benefiting the Guild." Cocula's presidency was conferred on him by McCullagh, who then departed the Union, and by Martin and his wife. At that coronation, the triumvirate also appointed one Michael Popp to be vice president of the Union. Popp formerly had worked for Respondent but had ceased that employment in January 1979. At the time, Popp was working full time at another job. What duties, if any, he ever performed for the Union remain a mystery.

[4] Martin testified that he resigned on March 1, 1979, although his letter to the employees, which is undated, was mailed, so he believed, about March 31. His testimony in this area was extremely vague and uncorroborated. It is my finding that his so-called resignation must have occurred about the same time that the letter was mailed, that is about March 31. This conclusion is consistent with my conviction and findings below that Martin's "resignation" was a tactic calculated to mislead the voters and therefore he had no reason to "resign" prior to the findings by the Regional Director that a second election should be conducted.

[5] The Third Circuit, in analyzing the materiality of the alleged misrepresentations, concluded that Martin's announcement of his removal as the real power in the Union went hand-in-glove with the further announcement that the Union's affairs would be handled by a board of influential citizens. Inquiry into the truthfulness of both statements is required to appreciate the full impact on the minds of the voters of either statement.

There emerges a picture of utter confusion surrounding the hierarchy of the Union after Martin's resignation, leading one to infer that the Union must have functioned on inertia generated by preresignation activity. But, this conclusion would overlook the one constant that dominates throughout, namely, Harry J. Martin. Having abandoned the title of president he immediately conferred upon himself the title "consultant," a position created by himself, for himself, and filled by Martin alone. His very creation of this job illustrates his continuing authority. In addition, the record conclusively shows that Martin continued to control and direct the affairs of the Union exactly as he had before he announced his resignation.

Martin's home continued to be the focal point for the Union's activities, and it was there that union records and telephone remained for some time. He continued to discuss union matters with employees, he continued to campaign in person and by phone, he continued to engage in consultation with other union officials concerning the affairs of the Union, and it was he who, on September 10, 1979, requested that Respondent bargain with the Union. His wife continued to serve as an officer of the Union, and, as noted above, the appointment of Cocula and Popp as union officers, in June 1979 was accomplished at a meeting attended by Martin, his wife, and McCullagh who simultaneously left the Union because he was not functioning on its behalf. In reality, Martin granted union titles as if the Union was his personal fiefdom, a state of affairs changed not at all by his resignation.

Martin's continued presence also manifested itself in dealings with the public at large. On May 22, 1979, he furnished an affidavit to the Board during its investigation of Respondent's objections to the second election. In it he described himself as a "consultant to the Union." Although he stated that "he resigned from the Union" he proceeded nevertheless to give evidence in support of the Union's position, evidence so unreliable that it reflects adversely on his credibility in this proceeding. He swore that four named persons had agreed to serve on a board of trustees despite the fact (as discussed below) such board never existed and that two of the individuals (John Reed and John Quattrone) were totally unknown to him and, for all that appears on the record, unknown to anyone. Incredibly, Martin attempted to minimize the imprecision, if not deliberate, inaccuracies in his affidavit, by testifying that he had not read the two-page affidavit before swearing to its truth. That self-serving testimony is as unbelievable as is his testimony that he "resigned" from the Union. Other matters of public record also show that Martin's continuing role in the Union was not that of a mere casual "consultant." In June 1979 it was Martin, together with Cocula, who witnessed Patrick McCullagh's letter resigning as president of the Union. In that same month the Union's lawyer filed a petition in the Regional Office for election at a firm called Capitol Security Systems (Capitol) with a copy of the cover letter being sent to "Harry Martin, President." In September 1979, it was Martin who sent a telegram to Respondent, signed by him as "advisor," stating that he would advise the Union to file unfair labor practice charges. In October 1979 Martin, on behalf of the Union, wrote the Regional Director for Region 22 with respect to the election that had been held at Capitol. In October 1979 Martin wrote to the Regional Director complaining in most vigorous terms about the refusal to bargain by Respondent and urging him to uphold the election. In January 1980 a copy of a letter by the Union's lawyer to the Regional Office relating to the Capitol election again was sent to Martin as president. In October 1980 the union lawyer filed an unfair labor practice charge against Capitol and in the cover letter, a copy of which was sent to Harry Martin, president, the Board was advised that Martin would "make the necessary witnesses available." Martin then gave the Board an affidavit in which he now described himself as a "Business Agent and Consultant" for the Union. The affidavit itself discloses that Martin personally was familiar with the details of the charge. In November 1980 the Regional Office wrote to the Union's attorney dismissing the charge against Capitol and, as expected, a copy of the letter was sent to Martin. And, as late as January 1982, the LM-3 form filed by the Union with the Department of Labor listed Harry J. Martin as the person to be contacted at the Union's official mailing address. The form itself was signed by Joseph Cocula as president and Martin's wife Nancy as treasurer.

The events surrounding the Union's efforts to organize Capitol dramatize Martin's continuing control over the Union most graphically. An election among the guards employed by that employer was conducted in August 1979, pursuant to an election agreement signed in July 1979 by Cocula on behalf of the Union. The campaign to organize those guards, however, began in February 1979. According to Eugene Hagen, president of Capitol, whose testimony in this regard is credited, it was Martin who approached him either February or March 1979 with respect to that organizing campaign and it was Martin with whom he dealt on behalf of the Union throughout that campaign. Significantly, Martin testified that the employees at Capitol never were advised of his purported resignation and that he consulted with, and advised, first McCullagh and then Cocula and Popp, concerning the Capitol campaign. We already have seen that Martin handled correspondence concerning Capitol and directed the Union's efforts before the Board with respect to that employer. Finally, when bargaining began, Martin was in charge of those negotiations and was the union spokesman.

B. *The Board of Trustees*

If there is a lingering doubt that Martin continuously controlled the Union, it can conclusively be dispelled by considering the circumstances relating to the board of trustees consisting of prominent citizens, the establishment of which Martin announced in tandem with his resignation. As shown below, no such board ever existed beyond Martin's imagination, and was but a further attempt by him to disguise the fact that he alone was the controlling voice of the Union.

Helen Szabo, superintendent of elections, Mercer County, New Jersey, who was announced as one of the members of the board, credibly testified that about June

or July 1978,[6] when she was serving as an assembly woman for the State of New Jersey, her secretary, McCullagh's wife, mentioned her husband's involvement in the Union and asked her if she would be willing to serve on a board of trustees. Szabo said that she would be willing to so serve. That conversation was the extent of her knowledge about, or participation in, the Union's affairs. The Union never was mentioned to her again, she never was appointed as a trustee, she never met anyone else who was identified as a trustee, she never attended any meetings of trustees, nor was she ever given the name of a single other trustee. The nonexistence of a board of trustees was further confirmed by Dr. Albert Valenzuela, Martin's personal physician. He testified credibly that, in April 1979, Martin asked if he would serve as a trustee of the Union and Valenzuela agreed to do so as a personal favor to his patient. Like Szabo, he never met another trustee, never attended a meeting of trustees, and was never involved in the affairs of the Union, and had no familiarity with labor relations matters generally.[7]

C. *Conclusions Regarding Martin's Resignation*

From the foregoing, and the entire record, there can be no other conclusion but that Martin's announced resignation simply is incredible. Indeed, we can look to his own testimony that, following his resignation as president and installation as consultant or advisor, he continued to serve the Union exactly as before. He conceded he performed the same tasks and functions although on a somewhat reduced scale, a claim of modesty unworthy of his true value to the Union. His continuing exercise of authority was, of course, required, because as Martin also acknowledged, his "successors" understood but little of the intricacies of running the Union, a matter of no surprise considering their lack of knowledge and experience in the world of labor relations. In sum, Martin remained the chief executive of the Union, and the announcement of his resignation resulted in no meaningful change in the way the Union was operated. The only change was in his title, a matter of little significance or consequence as Martin himself conceded. Additionally, the announced establishment of a board of trustees simply was untrue.

[6] Even if Szabo's recollection of the date is in error, the real substance of her testimony is unshaken. If the date is correct, then Martin was toying with the idea of a board of trustees long before the incidents involved here, further belying his claim that such a board was being established to fill the vacuum created by his removal. Under all the circumstances, it is unnecessary to consider the accuracy of Szabo's recollection of the date of an event which was of no real consequence to her, then or now.

[7] Respondent sought unsuccessfully to locate the two other members of the board, John Reed and John Quattrone, who were mentioned in the Regional Director's report as having been contacted by the Union to serve as trustees. I am satisfied that Respondent made good-faith efforts to locate these individuals. The Union's failure to call them as witnesses, or explain their inability to do so, warrants the inference that either they are fictitious, or that, if real, their testimony would not support the Union's cause. Nor did the Union offer so much as a wisp of evidence that a board of trustees had been created.

D. *The 9(b)(3) Claim*

We turn now to Respondent's contention that under no circumstances could the Union be certified to represent a unit of guards because it is affiliated with a nonguard union and, pursuant to Section 9(b)(3) of the Act, it therefore is precluded from representing the guards. As noted, this contention was raised in the initial hearing on the Union's petition. The evidence offered was found insufficient by the Regional Director, in his decision of January 22, 1979, to sustain Respondent's contention. Respondent's failure to utilize the review procedure afforded to it by the Board's rules constituted a waiver of any right to appeal the Regional Director's findings in a subsequent proceeding.[8] Accordingly, Respondent's attempts at subsequent stages to raise and litigate that contention, including at the initial unfair labor practice hearing, were rejected as improper efforts to relitigate that matter. The opinion of the circuit court remanding for the instant hearing in no way undermined that conclusion, although it did allow for the exploration of new evidence (see fn. 9 of the court opinion quoted above). Accordingly, Respondent was permitted to introduce evidence which it could not have been aware of at the time of the January 1979 hearing, but evidence which it knew, or should have known, was rejected.

The only evidence considered therefore relates to the relationship between Martin and one Samuel P. Rocco. In 1979, Rocco had been the president of Local 1371, United Food and Commercial Workers Union (UFCWU), an organization born as a result of merger, at the International level, between the Retail Clerks Union and the Amalgamated Meat Cutters and Butcher Workmen Union. In 1981, Locals 1371 and 1360 UFCWU, merged to form Local 1360 UFCWU, with Rocco as secretary-treasurer. In his January 1979 decision, the Regional Director noted that Martin had been a member of the Retail Clerks Union at the time he organized the Union involved herein (the Guild). That fact, however, considered together with additional information concerning an alleged relationship between the Retail Clerks and the Guild, was not concluded sufficient to establish a prohibited relationship within the meaning of Section 9(b)(3). Respondent offered no evidence here bearing on this relationship at the time of the 1979 hearings which it did not know at that time, or which it could not have obtained through the exercise of due diligence. Rather, the sole new evidence relates to events which occurred in the spring of 1980.

According to the credited testimony of Rocco, he has been a personal friend of Martin's since 1966 and knew that Martin was organizing Respondent's security guards and forming the Union. He also knew that Martin had "resigned" his leadership of the Union and, although he recalled offering Martin a job as an organizer in his union on numerous occasions, he could not specifically link those offers to Martin's resignation. As a result of this longstanding friendship with Martin, Rocco also knew that Martin was engaged in collective bargaining with Capitol which, according to Hagen, commenced

[8] *Walnut Mountain Care Center*, 236 NLRB 284 (1978).

about June 1980. Approximately six meetings were held before negotiations terminated without contract having been reached. Hagen credibly testified that Martin was the main, if not sole, contact he had with the Union until the start of negotiations. During the six bargaining sessions Martin continued to be a spokesman and he alone was present at all meetings although he was assisted at some meetings by Popp, McCullagh, and Cocula. In addition, Hagen placed Rocco at three of those meetings, while Rocco himself recalled being present at approximately two of them. Aside from this slight difference in testimony, both Rocco and Hagen essentially agreed that, when Rocco was present, he did participate in the discussions. Rocco offered proposals concerning wage increases and company contributions to a health plan sponsored by UFCWU, a proposal later withdrawn when Rocco learned that only members of UFCWU were eligible to participate.

At no time in negotiations did Rocco refer to the Retail Clerks, UFCWU, or any other labor organization, or to his position in such unions. Both Hagen and Rocco are in accord that the latter's remarks did not appear to represent anything other than those of one friend helping another. In fact, when Rocco first spoke he had not identified himself and it was necessary for Hagen to inquire his purpose in being there. Hagen's attorney, who apparently knew the participants, replied that Rocco was there to assist Martin. Hagen conceded that Martin was the only union representative present at all the negotiations and was its chief proponent. Hagen, however, characterized Rocco as the main spokesman at those meetings he attended, a view not shared by Rocco whom I credit in this respect.

The evidence leads me to conclude that Rocco participated in the negotiations in his individual and personal capacity, and not as the representative of any labor organization. Furthermore, even if Rocco's presence can be transmuted into a union (Retail Clerks and/or UFCWU) presence, a finding I decline to make, that would be insufficient, standing alone or in conjunction with all the evidence heretofore relied on by Respondent, to provide a sufficient basis to warrant the conclusion that the Union now is, or at any time was, affiliated directly or indirectly with an organization which admits to membership employees other than guards. Accordingly, I find that the Union is not barred by Section 9(b)(3) of the Act from representing the unit of guards herein.

Discussion

Having found that the Union misrepresented material facts, i.e., that Martin relinquished control of the Union and that the Union's affairs would be governed by a board of trustees consisting of prominent citizens, and the court having concluded that such material misrepresentations require a new election pursuant to the Board's *Hollywood Ceramics* rule, the case would appear to be concluded. However, as recited above, following the remand order of the court, the Board abandoned the *Hollywood Ceramics/General Knit* rule and established instead the *Midland/Shopping Kart* rule to be applied to all pending cases. The rule of retroactivity ordinarily would mean that the instant case would be governed by *Midland* and not by *Hollywood Ceramics*, notwithstanding the conduct occurred at a time when *Hollywood Ceramics* applied. Respondent urges that the intervening court opinion constitutes the law of the case, however, and therefore *Hollywood Ceramics* applies. Thus, the question is presented whether the Board's general principle of retroactivity can be applied in a situation where a circuit court has asserted exclusive jurisdiction over the case pursuant to Section 10(e) and (f) of the Act, and has remanded the proceeding to the Board for a determination consistent with the court's order.

It is most likely that if the Employer initially had been granted a hearing on its objections to the second election, a new election would have been ordered pursuant to the *Hollywood Ceramics* rule,[9] which rule if still in effect would result now in that eventuality. In *Blackman-Uhler Chemical Division*, 239 NLRB 637 (1978), the Board discussed its policy of applying rules retroactively in a situation somewhat similar to the instant matter. In that case, as here, it had found no material misrepresentation under *Hollywood Ceramics*, certified the union, and eventually issued a bargaining order, a decision then enforced in the circuit court. However, following a rehearing en banc, the court denied enforcement of that order noting that, in the interim, *Hollywood Ceramics* had been abandoned by the Board in its *Shopping Kart* decision. The en banc court remanded the case for a determination whether to apply *Shopping Kart* or *Hollywood Ceramics*. The Board in its decision on remand acknowledged that retroactive application of rule changes is the traditional practice but declined to abide by that practice because "the case before us is one in which the Board has not only decided the representation case but has also rendered a bargaining order under the law as it then existed (*Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962)); in these circumstances we decline to reopen this matter which we have finally decided." *Blackman-Uhler*, supra at 637.[10] If that statement of the law is followed in the instant matter it might be said that the *Midland/Shopping Kart* rule should not be applied retroactively, and that the case should be decided under *Hollywoood Ceramics/General Knit* which in this instance would result not in enforcement of the bargaining order but in setting it aside.

The continued vitality of the majority holding in *Blackman-Uhler* with respect to nonretroactivity, however, appears questionable. In *Midland Life Insurance Co.*, supra at 24, the Board expressly followed Member Penello's dissent in *Blackman-Uhler* for reasons given by him, most notably because "the *Hollywood Ceramics* rule oper-

[9] I am assuming that substantially the same evidence would have been presented as in the instant hearing and that my conclusions on that evidence will be sustained.

[10] It should be noted that nevertheless the Board did set the election aside because the court indicated its view that under *Hollywood Ceramics* the bargaining order was not issued appropriately because the union had engaged in a material misrepresentation. Then Chairman Fanning and Member Jenkins would not have applied *Shopping Kart* because they dissented in that case. Member Murphy concurred that retroactive application of *Shopping Kart* was inappropriate and Member Truesdale concurred as to nonretroactivity but agreed with the court that a misrepresentation had been committed. Member Penello dissented and would have followed the principle of retroactivity.

ates more to frustrate than to further the fundamental statutory purpose of assuring employee free choice." Similarly, in *Rex-Hide, Inc.*, 241 NLRB 1178 (1979), a case involving preelection misrepresentations, the second election was conducted under *Hollywood Ceramics*, the Regional Director applied *Shopping Kart* retroactively, and the Board, in turn, in the unfair labor practice proceeding applied *General Knit* retroactively, relying on *Blackman-Uhler.*[11] Again, in *Mosey Mfg. Co.*, 255 NLRB 552 (1981), an election was held when *Shopping Kart* was the rule. A bargaining order eventually issued but, by the time enforcement was requested, *General Knit* had issued and, at the urging of the Board, the case was remanded for consideration under *Hollywood Ceramics/General Knit*, in other words, retroactivity held the day. Thereafter the Board, applying *Hollywood Ceramics/General Knit*, found that material misrepresentations had not occurred and reissued a bargaining order. The court, however, declined to enforce, *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983), holding that the unusual circumstances of that case barred enforcement or a further remand. The court was particularly concerned that the Board sought the latest review pursuant to yet another change in policy, i.e., the resurrected *Shopping Kart* standard as announced in *Midland*. The court doubted the Board intended to apply the latest change in policy retroactively to an election conducted 5 years before.

The above cases indicate that retroactivity is to be favored absent extraordinary circumstances which would unduly penalize a party. It is my sense that, on balance, this principle should apply here as it furthers the statutory purpose of assuring employee free choice, the consideration deemed overriding in *Midland*. Although I am convinced that an error was committed in not granting another election based on the Employer's objections under the rule prevailing at that time, we now know that such rule itself was an error. Respondent's harm in having its bargaining obligation delayed since early 1979 is slight if nonexistent, when compared to the injury to employee free choice. Accordingly, I would apply the *Midland/Shopping Kart* rule and hold that the misrepresentations, while made, were irrelevant.

There remains for consideration Respondent's last contention that the misrepresentation here falls within the limited exception to *Midland*, 263 NLRB at 133, where the Board announced that it still would "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. As was the case in *Shopping Kart*, we will continue to protest against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice. The only other exception recognized in *Midland* is that elections will also be set aside "when an official Board document has been altered in such a way as to indicate an endorsement by the Board of a party to the election." *Midland*, supra, id. at fn. 25.

Respondent aruges, in effect, that Martin's misrepresentations were so egregious they amounted to campaign trickery of the first order and thus prevented an uncoerced choice. To accept this reasoning, however, would place the Board precisely where it does not want to be, namely, back in the business of policing campaign rhetoric to determine whether statements are true or false. That the Union's statements here were patently false is well established in my view, but they do not fall within the narrow exceptions to the *Midland* doctrine. Accordingly, I reject Respondent's arguments in this regard.

[Recommended Order omitted from publication.]

[11] The *Rex-Hide* opinion may rest, however, on the peculiar circumstance that by applying *General Knit* retroactively, the Board in effect was deciding the case under *Hollywood Ceramics*, the rule in effect at the time of the election.