

**Phoenix Mechanical, Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Sanada, Local 189, AFL-CIO, Petitioner.**  
Case 9-RC-15689

July 25, 1991

DECISION AND CERTIFICATION OF  
REPRESENTATIVE

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on August 17, 1990, and the Acting Regional Director's supplemental report recommending disposition of them. The election was conducted pursuant to a Stipulation and Agreement for a Second Election. The tally of ballots shows 14 votes for and 12 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Acting Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

In its objections, the Employer contends that during and after the election business agents of the Sheet Metal Workers Union, Ohio Local 24 told certain employees that voting for the Petitioner would be tantamount to voting for Local 24, and that if the Petitioner won the election the employees would automatically become members of Local 24. The Employer further contends that this conduct so confused certain employees that they did not know whether they were voting for the Petitioner or for Local 24. Local 24 is not a party to the election. The Acting Regional Director found, and we agree, that the alleged conduct was, at most, a misrepresentation by a third party which does not warrant setting aside the election.

The Board accords less weight to conduct by a nonparty than to conduct by a party because "neither unions nor employers can prevent misdeeds . . . by persons over whom they have no control." *NLRB v. Griffith Oldsmobile*, 455 F.2d 867, 870 (8th Cir. 1972), enfg. 184 NLRB 722 (1970). Thus, the Board generally will overturn an election based on third-party conduct only when it is so aggravated that it creates a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802 (1984).

As noted by our dissenting colleague, the Board and courts in particular circumstances have also set aside an election tainted by conduct which is boisterous, sustained, and intrusive into the election process, as in *Pepsi-Cola Bottling*, 291 NLRB 578 (1988), or which is tainted by irrelevant, inflammatory racial appeals, as

in *M & M Supermarkets*, 818 F.2d 1567 (11th Cir. 1987). Contrary to our colleague, however, we view the decisions in those two cases as consistent with the *Westwood* standard. In both cases the activity was found to be egregious—certainly going beyond sowing confusion—unlike the conduct asserted as objectionable in this case.

In any event, *Pepsi-Cola* and *M & M* are distinguishable from the instant case. First, neither case involved third-party misrepresentations, as here. In *Pepsi-Cola*, the Board set aside an election where a group of prounion employees engaged in sustained, boisterous prounion conduct which included, inter alia, forcing voters to pass between two lines of chanting, cheering union supporters to enter the polling place. Critical to the Board's decision was that the conduct occurred in the non-electioneering area. At issue in *M & M* was a series of derogatory and highly inflammatory anti-Semitic statements and appeals to racial prejudice by a prounion employee during a meeting called by the employer and attended by other employees. Because appeals to racial and religious bias have no place in either our system of justice or in an election, the court declined to apply a third-party standard and applied instead the standard used where a party appeals to racial prejudice. The court, therefore, refused to uphold the Union's election victory.

Further, we need not rely, as our dissenting colleague suggests, on *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). The *Midland* line of cases discusses the effect on an election of misrepresentations by a party to that election. Here, we are faced with alleged misleading statements by a nonparty; and no precedent is cited for setting aside an election based on conduct of the kind alleged here. *Pacific Southwest Container*, 283 NLRB 79 (1987), on which our colleague relies, is inapposite. That case involved potential voter confusion as a result of a postpetition, preelection merger of the petitioner with another union. Thus, the voter confusion arose because of the conduct of a party (i.e., the petitioner's merger with another union) and involved an actual change in the bargaining representative.

Here, the Notice of Election and the ballot made clear that the Petitioner, alone, sought to be the exclusive representative of the unit employees. In these circumstances, the alleged misleading statements by persons not parties to the election would not tend to create an atmosphere warranting a new election. Thus, we shall adopt the Acting Regional Director's recommendations and certify the Petitioner.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting

Industry of the United States and Canada, Local 189, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production employees employed by the Employer at its 145 West Fifth Avenue, Columbus, Ohio facility excluding all office clerical employees, confidential employees and all professional employees, guards and supervisors as defined in the Act.

MEMBER RAUDABAUGH, dissenting.

The issue in this case is whether employees were misled as to who would be their Section 9 representative if they voted in favor of representation in the election. The choice on the ballot was whether employees wished to be represented by Pipefitters. The proffered evidence is that four employees who do sheet metal work were told by agents of Sheet Metal Workers that a vote for Pipefitters would be a vote for representation by Sheet Metal Workers. That is, if Pipefitters won, the Employer would negotiate with Sheet Metal Workers as to employees doing sheet metal work. This is proffered evidence that at least two, and possibly all four, of these employees were confused by these statements. The Pipefitters won the election by two votes, with one challenged ballot.

My colleagues in the majority apparently conclude that, even if all the foregoing is true, the conduct is a mere misrepresentation, insufficient to overturn the election. See *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). In my view, if employees are mis-

led as to whom they are voting for, that is more than a simple misrepresentation. It goes to the heart of what the election is all about. The Board will not certify a union unless the election results unquestionably reflect the employees' intent. *Pacific Southwest Container*, 283 NLRB 79, 80 (1987). I think that there is a question as to whether a majority of employees has chosen Pipefitters as their representative.

The fact that the confusion was sown by a third party does not require a contrary result. Conduct by a third party can be used to overturn an election even where the conduct does not involve violence, threats of violence, or fear of reprisal. See *Pepsi-Cola Bottling*, 291 NLRB 578 (1988); *M & M Supermarkets*, 818 F.2d 1567 (11th Cir. 1987). Concededly, these cases do not involve confusion sown by a third party. But these cases do belie the notion that only certain kinds of third-party conduct can be objectionable. My colleagues appear to take the contrary position that certain kinds of conduct, e.g., sowing confusion, cannot constitute objectionable conduct. In my view, an objections case is not to be resolved by categorizing kinds of conduct but rather by asking whether the conduct is a particular case has interfered with the laboratory conditions necessary for the holding of an election. I submit that if voters are confused as to who they are voting for, and if the number of such confused voters is sufficient to be determinative, it can hardly be said that "laboratory conditions" existed for purposes of determining the electoral desires of the employees.

In light of the above, I would hold a hearing as to what misleading statements may have been made and the impact of such statements.