

MEMORANDUM

TO: ALL CONSULTANTS
FROM: FRANK DENNIS
DATE: JANUARY 26, 1979
RE: MISREPRESENTATIONS PRIOR TO ELECTION

On December 6, 1978, the NLRB reversed its three-year old rule on the effect of misrepresentations before an election. The old rule had been stated in the Shopping Kart decision (94 LRRM 1705). The Board has clearly and specifically returned to the rule stated in Hollywood Ceramics, 51 LRRM 1600. That case stands for the proposition that the Board will overturn an election where there have been substantial and material misrepresentations in the final hours of an election campaign without opportunity for the other party to make an effective reply where the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

Where a misrepresentation has been made, we should examine the statements in the following progression.

1. Was there a misrepresentation?
2. Was it substantial and material?
3. Was it so close to the election that there was no opportunity for an effective reply?

Almost any propaganda from either side will contain statements which will arguably contain misstatements. They range from unimportant things like misnaming the business representative or a manager, to something material like the profit picture of a company. The question to be answered is "Was it substantial and material?" A statement is substantial when "it may reasonably be expected to have a significant impact on the election." (Speech of Board Member John Truesdale before the Federal Bar Association, December 11, 1978.)

A statement is material when it is germane to the circumstances before the Board. The profit example is both substantial and material because the economic health of a company is almost always an issue. An extreme example of a substantial misrepresentation that is not material would be that other employers in the industry have made large profits when such is not true. The representation is not factual but it is likely to also be immaterial to the election at particular employers.

The timing of a statement is crucial. If the misrepresentation occurs so close to the election that there is no chance for rebuttal, then the Board will examine the substance and materiality. If the employer could have effectively rebutted the statement, or did in fact rebut the statement, the Board will take no action. A subsidiary issue, then, is whether the employer or union had information at their disposal to rebut the misstatement. If the statement is within the knowledge of one party or the other, the rebutting party will need more time for rebuttal. The Board will look at all the circumstances in reaching their decision.

The Board recognizes the ability of the employees to see through or disregard most campaign rhetoric. They feel that a statement must have been likely to influence the election before a new election or other remedy will be ordered. Courts have looked to the closeness of the vote to determine likelihood of influence. If it is a landslide on one side, the Board is not likely to overturn in any event. If, however, the vote is close, the Board is more likely to act.

Examples of misrepresentations upon which the courts overturned the Board are:

1. Union told employees employer had bribed Board agent to disregard previous ULP allegations, NLRB v. Lord Baltimore Press Inc., 370 F.2d 397, 64 LRRM 2055 (C.A. 8, 1966).

2. Union told employees that in comparison to competitor employer was paying five days pay for six days work (a very close vote 1082 for 1036 against), Bata Shoe Company Inc., 377 F.2d 821, 65 LRRM 2318 (C.A. 4, 1967).

3. False profit reports put out by union near time of election and false statements were deliberate. Aircraft Radio Corp., 89 LRRM 3060, 519 F.2d 590 (C.A. 3, 1975).

4. Assertions were made by union that the company had made employer profit when the profits cited were those of parent company - hearing ordered - Argus Optical, 89 LRRM 2280, 515 F.2d 939 (C.A. 6, 1975).

5. Union exaggerated the pension benefits it would obtain for seasonal workers - close vote 314 for, 310 against. NLRB v. Snokist Growers, 91 LRRM 3056, 532 F.2d 1239 (C.A. 9, 1976).

6. Union falsely stated that, for example, they had negotiated clauses which allowed security guards to transfer to production positions and from production positions if they were not satisfied, in other contracts. A hearing was ordered (Firestone Tire & Rubber, 92 LRRM 3184, 533 F.2d 336 (C.A. 6, 1976)).

7. Union erroneously claimed employer was guilty of unfair labor practices by discharging an employee when such was not the case. Another close election (Santee River Wool, 92 LRRM 2922, 537 F.2d 1208 (C.A. 4, 1976)).

Finally, keep in mind that while all but a few of the cases cited in the leading case General Knit, 99 LRRM 1687 deal with union misrepresentations, management

runs the risk of facing a new election after winning a close one for a fairly innocent statement. The key is to know your vote count and do what you have to do.