

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PASADENA UNIFIED SCHOOL DISTRICT,)	
)	
Employer,)	Case No. LA-D-145
)	
and)	
)	
CALIFORNIA SCHOOL EMPLOYEES)	PERB Decision No. 530
ASSOCIATION, CHAPTER #434,)	
)	October 25, 1985
Employee Organization,)	
)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS, LOCAL #63,)	
)	
Employee Organization.)	

Appearance; E. Luis Saenz, Attorney for California School Employees Association, Chapter #434.

Before Hesse, Chairperson; Morgenstern and Porter, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on objections to a decertification election filed by the California School Employees Association, Chapter #434 (CSEA). As set forth more fully infra, CSEA claims that the International Brotherhood of Teamsters, Local #63 (Teamsters), engaged in conduct which interfered with the employees' right to freely choose a representative. The PERB hearing officer conducted an evidentiary proceeding and dismissed CSEA's objections.

For the reasons set forth below, we reject CSEA's objections to the conduct of the election and certify the results of that election.

FACTUAL SUMMARY

On October 14, 1983, the Teamsters filed a decertification petition requesting that an election be held in the unit of classified employees of the Pasadena Unified School District. At that time, CSEA was the exclusive representative. That petition was deemed untimely by PERB. The Teamsters withdrew that petition and refiled on March 8, 1984. The Board conducted an election on May 31, 1984. The results were as follows:

Teamsters, Local #63	137
CSEA, Chapter #434	128
No Representation	7
Challenged Ballots	0
Void Ballots	11

CSEA filed objections to the election pursuant to PERB Regulation 32738. The alleged misconduct consists of the printing and circulation of an election flyer which pictured individual employees and groups of employees beneath a heading which indicated their intention to vote for the Teamsters in the upcoming election and urged other employees to do the same.

In support of its objections to the election, CSEA asserts that employees in the photographs did not support the Teamsters, and that other employees voted for the Teamsters on the mistaken belief that the pictured employees were indeed Teamsters supporters.

Six employees pictured on the Teamsters' flyer testified on behalf of CSEA. Melvyn Mercado testified that, on Friday, May 25, 1984, at approximately 2:40 p.m., his co-worker, Gayl Williams, and Teamsters employee Howard Friedman approached him and, without saying anything, took his picture. Mercado said he first saw the flyer on election day, May 31. It was posted on the wall of his shop with his photo circled and an arrow pointing to his picture.

Mercado testified that he had signed an authorization card for the Teamsters in mid-July 1983¹ and, on one occasion, talked to Williams about his unhappiness with CSEA. However, he voted for CSEA in the election.

Lawrence Clark and Alfonso Lopez were photographed together. They testified that, during the afternoon of May 25, Williams and Friedman approached them in the back of the service center.

¹The card Mercado signed reads as follows:

AUTHORIZATION FOR REPRESENTATION

I, the undersigned employee of the Pasadena Unified School District no longer wish to be represented by the California School Employees Association Chapter No. 434 and hereby designate the Teamsters, Local No. 63/Public Sector Division as my sole and exclusive bargaining representative for all matters relating to wages, hours, and other terms and conditions of employment as authorized by Chapter 10.7 of the Government Code.

The Teamsters introduced into evidence cards signed by Mercado, Alfonso Lopez, Phichai Prathumratana, Edward Mooney, Ruben Garcia, Sheila de Cora, Lawrence Clark, Patrick Russell and J. W. Sowell.

Lopez had just purchased a new Harley Davidson motorcycle and Clark and two other employees were admiring it.

And as we were looking at the motorcycle, Gayl and Mr. Friedman walked up. And Gayl asked me was that my motorcycle, and I said, "No, it's Al's." And he was telling us how beautiful it was and asked us if we could get around it so he could take a picture of us and the motorcycle. So we got around it, and we all posed for the picture.

Clark testified that Friedman said, "[t]his is for the Teamsters" just as Williams got ready to snap the picture. After they took the picture, they walked off. Lopez' testimony similarly recounts the incident, although he stated that the Teamsters were not mentioned until after the picture was taken and Williams and Friedman were walking away. Neither Clark nor Lopez had any clear idea on May 25 as to the purpose for the photo, although Clark said he thought that, since he also owned a Harley Davidson, Williams was going to make him and Lopez a copy or hang one in the shop.

Both Clark and Lopez testified that they did not see the Teamsters' flyer until the morning of election day. Both men also testified that they signed decertification cards, but that they were not Teamsters supporters and voted for CSEA in the election.

According to Dexter Clark, Williams and Friedman approached him late in the afternoon on May 25. Clark said that Williams asked him if he wanted his picture taken. Clark said yes. While Williams proceeded to take the picture, Friedman handed Clark a

sign which read "Vote Teamster." According to Clark, ". . . by the time I got hold of it, Gayl had snapped a picture." Clark said he never saw the sign Friedman gave him. When asked why he thought the picture was taken, Clark testified that he thought Williams had a new camera but that he did not know what was going on because it all happened too fast and it was late on a Friday afternoon when he was on his way home. Clark said that he voted for CSEA.

William F. A. Averill and Cesareo Baltazar were photographed together. Averill testified that the picture was taken close to quitting time, around 2:40 - 2:45 Friday afternoon. He said that Williams approached him and asked if he could take his picture. Averill had no objection, testifying ". . . 15 minutes before you leave on a Friday, you don't really care what's going on." Friedman handed Averill the "Vote Teamster" bumpersticker. Averill said he looked at the bumpersticker at the same time that Friedman handed it to him, but the whole incident happened fast. After Williams had taken the picture, Averill gave the bumpersticker back to Friedman saying "I don't want this thing."

Averill said he first saw the flyer on election day, posted on the door of the gardening department. He testified he was not a Teamsters supporter and, although undecided before the election, voted for CSEA.

Baltazar similarly described the incident, adding that, when Friedman handed him the bumpersticker, it was upside down and, before the picture was taken, Friedman righted it. Baltazar

said he voted for CSEA. On cross-examination, he admitted to giving Williams a "V for Victory" sign the day after the election. On redirect examination, he explained that the hand motion he returned to Williams was only to say "hi."

In addition to those employees photographed, six additional employees testified on CSEA's behalf. Edward Mooney testified that he was surprised to see the photographs of Mercado, Averill and Baltazar on the Teamsters' flyer. He stated that, because of the flyer, he believed them to be Teamsters' supporters and that the flyer influenced the way he voted. Mooney also testified that, on election day, after he saw the flyer, he could not get to Mercado before he voted.

Patrick Russell testified that Mercado's picture on the flyer influenced him to vote for the Teamsters because, since Mercado had more seniority, he valued Mercado's opinion. Since he had no time to talk to Mercado after seeing the flyer, Russell said that the flyer changed his vote.

Similarly, Elden Bulen testified that he saw the flyer on the morning of election day. He was influenced by the flyer to vote for the Teamsters because of Mercado, L. Clark and Lopez. Bulen testified that he figured Mercado knew something he did not.

Sheila de Cora also testified that, when she saw Mercado's picture on the flyer, she thought he must have a good reason to vote for the Teamsters. She testified:

- A. I was all set to join, vote for CSEA. And I saw Mel's picture as a Teamster, and since I rely on him to keep me informed

about things, I figured he was much better informed than I was, and if he voted for Teamsters, then he must have had a very-good reason for doing that.

Q. Well, at 7:00 in the morning of May 31, when you first saw Joint Exhibit No. 1, did you believe that Mel Mercado, and all those other individuals pictured on Joint Exhibit No. 1 supported the Teamsters?

A. Yes, I did.

Q. Then Joint Exhibit No. 1 caused you to vote for the Teamsters.

A. Yes.

Ruben Garcia testified that it was Lawrence Clark's picture that influenced his vote. He said he believed Clark and the others photographed to be Teamsters supporters and, because of the flyer, he voted for the Teamsters instead of CSEA.

Finally, Phichai Prathumratana testified that he is a good friend of Mercado and follows his advice. The flyer influenced him because he thought that, if Mercado had changed his opinion, he would change his, too. The flyer caused him to vote for the Teamsters.

Three witnesses testified on behalf of the Teamsters. Carole Cook, a Teamsters organizer, testified that the flyer is a frequently-used organizing tool, and that it was her idea to use it in this election. She said that, when photographing every employee, those taking the pictures should identify themselves fully and state why the pictures were being taken. Cook accompanied Williams during the morning of May 25, and said that her affiliation with the Teamsters was clearly stated. She

testified that Williams took at least two shots of each employee. According to Cook, some people refused to have their pictures taken for the flyer, and Williams did not take their pictures.

Gayl Williams testified that he photographed the employees for the flyer. Cook accompanied him in the morning, Friedman in the afternoon. Williams said that it took 15-30 seconds to take each picture and that the plan was to photograph only Teamsters supporters. During the morning session, Williams said he let Cook do most of the talking and did not start focusing the camera until the employee said it was alright to do so. He testified that, to the best of his knowledge, no photographs were taken of people to whom the flyer and its purpose were not explained.

Williams said that Mercado seemed uncommitted to either side during the election. Mercado approached Williams and Friedman during the afternoon session and asked what Williams was doing. Williams told him about the flyer.

Q. So Mel approached you?

A. Um-hmm.

Q. And asked you what you were doing?

A. What's going on, or what's happening or something like that. And I explained to him what was going on.

Q. What did you say?

A. That we were putting together a collage of pictures for a Teamster news bulletin.

Q. What did he say?

A. All right.

Q. Well did someone ask him if they could take his picture?

A. I really don't recall.

Q. But you do recall you said, what did you say, A-ok?

A. Yeah. Something to that effect, yes.

Williams also testified about the picture of Clark and Lopez. Although Williams recalled saying that the motorcycle was beautiful, he also said that Friedman told the men about the flyer and asked for permission to take their pictures. One employee, Kenneth Crumlett, who was nearby, refused and walked off.

Williams' testimony about taking the picture of Dexter Clark is brief and unclear. However, as to Averill and Baltazar, Williams remembered taking two shots because Baltazar was holding the bumpersticker upside down on the first shot.

Williams said that Friedman had 200-300 flyers printed and they began distributing them on Wednesday morning.

Howard Friedman, employed by the Teamsters and in charge of the Pasadena campaign, also testified at the hearing. He said that at least a half dozen Teamsters mailings were sent to employees' home addresses. As to the particular flyer in question here, he stated:

A. . . . I made certain that we informed the employees. First, received permission to take their picture. And, second, carefully explain to them the use of the bulletin.

Q. Are you aware of any situations where the employees were not told what the purpose of the photographs were?

A. I am not aware of any such situations.

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Q. Were there any employees whose pictures were taken who did not give permission to have their picture taken.

A. I am not aware of any.

Q. Were there any employees who didn't give their permission?

A. Yes.

Q. And what happened in those cases?

A. Their pictures were not taken.

Referring to Mercado, Friedman said that he gave his permission to be photographed. Friedman testified that he was told by Williams and another that Mercado was "leaning toward the Teamsters."

As to the picture of L. Clark and Lopez, Friedman said he remembered telling them about the flyer and urging Crumlett to join the others in the photo. Crumlett chose not to and stepped aside while the picture of the others was taken.

Friedman had met Averill and Baltazar on several occasions during the last weeks of the election campaign, had given them both Teamsters' hats and, on occasion, had seen them wearing the hats. When Friedman told them about the flyer he was preparing, neither were reluctant to be photographed. According to Friedman, he showed them the words on the bumpersticker when he

handed them to the men. He recalled that Baltazar's bumpersticker was upside down and Williams had to take a second picture.

DISCUSSION

PERB Regulation 32738 provides that, within 10 days following the tally of ballots, any party to an election may file objections to the conduct of the election. Regulation 32738(c) states as follows:

Objections shall be entertained by the Board only on the following grounds:

- (1) The conduct complained of interfered with the employees' right to freely choose a representative, or
- (2) Serious irregularity in the conduct of the election.

Applying the Board's prior case law to the instant case,² the threshold question is whether use of the photographs on the Teamsters' flyer was improper. If the Board finds that the six employees, either expressly or by implication, authorized the

²Previous PERB Regulations permitted objections to elections where serious irregularities occurred and where the conduct complained of was "tantamount to an unfair practice." Under the past Regulations, the Board first determined whether the conduct was tantamount to an unfair practice and, if that threshold question was satisfied, then entertained the election objection and, in certain cases, ordered the results overturned. See San Ramon Valley Unified School District (1979) PERB Decision No. 111 and Jefferson Elementary School District (1981) PERB Decision No. 164. Under the current language of Regulation 32738, demonstration of unlawful conduct remains a threshold concern. Clovis Unified School District (1984) PERB Decision No. 389.

use of their photographs for the Teamsters' flyer, then, clearly, no deceptive or otherwise improper conduct occurred.

First, contrary to CSEA's assertions, we find it of little consequence that none of the six employees were told of the purpose of the photos until after the pictures were taken. The critical issue is whether, either directly or indirectly, the six employees were ever aware of the purpose of the photographs. Mercado said he was told nothing, but Williams and Friedman said Mercado was told about the flyer; L. Clark and Lopez said they were told the picture was "for the Teamsters"; and D. Clark, Averill and Baltazar all were photographed holding Teamsters' bumperstickers. Thus, based on these facts, we conclude that all of the employees were aware that their pictures were being taken and were either directly told about the flyer or, since they were holding "Vote Teamster" bumperstickers, must have been aware of the pictures' connection to the election.

Given this awareness, we find it significant that none of the men spoke out, made any inquiries of Williams or Friedman, or asked that their picture not be used in connection with the election. For example, consider Lopez, who testified that, as the picture was being taken, Friedman said, "This is for the Teamsters."

Q. Now, what did you think Mr. Friedman meant when he stated, "This is for the Teamsters"?

A. Well, I didn't really know. You know, I didn't know what they were going to use it for.

Q. Did you pay much attention to the comment?

A. No, not really.

Lopez testified that, while he knew both Williams and Friedman were involved with the Teamsters, he did not ask them what they were going to do with the picture. Similarly, Clark testified that, while he did not know what Friedman meant when he said, "This is for the Teamsters," he did not ask.

In our opinion, testimony such as this suggests at a minimum that these six employees acquiesced to (if not cooperated with) the Teamsters' campaign plan. Examination of the flyer itself supports this conclusion. Most of the six are smiling and all appear to be posing for the camera.

Measured against the current National Labor Relations Board (NLRB) standard, where an election will be set aside not on the basis of the substance of the representation, but the deceptive manner in which it was made,³ it is irrelevant whether the

³In Midland National Life Insurance Co. (1982) 263 NLRB 127 [110 LRRM 1489], the NLRB overruled its decisions in Hollywood Ceramics Co. (1962) 140 NLRB 221 [51 LRRM 1600] and General Knit of California, Inc. (1978) 239 NLRB 619 and returned to the rule advanced in Shopping Kart Food Markets, Inc. (1977) 228 NLRB 1311 [94 LRRM 1705]. In its discussion, the NLRB reviewed the vacillating Board decision and the difficulties in adopting the appropriate standard of administrative review. Under the Midland rule, the NLRB announced that it would:

. . . no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a

pictured employees in fact intended to vote for the Teamsters.⁷ Under the Midland rule, the election would be overturned only if the photograph was a forgery, made in a deceptive manner. As noted supra, the evidence urges the conclusion that the employees cooperated with Williams and Friedman by permitting them to take their pictures and, when told that the pictures were "for the Teamsters," made no inquiries and voiced no objections.

Based on the totality of the circumstances, we conclude that CSEA failed to satisfy its burden of showing that the Teamsters engaged in unlawful conduct. Accordingly, it has not demonstrated an adequate basis to overturn the election.

While affirming the hearing officer's conclusion, we are nevertheless compelled to note our disagreement with his ruling as to the admissibility of the evidence of voter impact. In San Ramon, supra, the Board said it was unwilling to require that the secrecy of an individual's election conduct be invaded in order to present affirmative proof that the protested activity had a direct impact on the election results. Here, however, the six employees came forward voluntarily. The hearing officer, by

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. (Footnotes omitted.)

⁴**It** is nonetheless noteworthy that, of the six, Mercado, Lopez and L. Clark had signed cards for the Teamsters indicating their opinion that CSEA should be decertified.

considering the possible invasion of privacy of employees whose votes changed to CSEA, misreads PERB's standard. If the Teamsters' conduct had been improper, then the critical question would have been whether it was sufficiently likely that the improper conduct influenced the vote and caused employees to vote as they did.⁵ Proof that other employees withdrew Teamsters support does not disturb the impact on the six voters who testified.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the objections to the conduct of the election filed by the California School Employees Association, Chapter #434, in Case No. LA-D-145 are hereby DISMISSED.

Chairperson Hesse joined in this Decision. Member Porter's concurrence begins on p. 16.

⁵**Since** we find that the evidence does not clearly establish improper conduct, it is unnecessary to reach the issue of voter impact. However, it is again noteworthy that of the six who testified regarding the flyer's impact, five had previously favored decertification of CSEA.

Porter, Member, concurring: I concur in the dismissal of the objections.

Prior decisions of this Board have dealt with objections to elections involving alleged misconduct and/or asserted irregularities which involved, respectively, employers, Board agents, and competing employee organizations. These decisions have dealt with both former and present PERB Regulation 32738(c). San Ramon Valley Unified School District (1979) PERB Decision No. 111; Jefferson Elementary School District (1981) PERB Decision No. 164; Clovis Unified School District (1984) PERB Decision No. 389.

A distillation of the foregoing decisions renders in essence the following approach by this Board to election objection cases:

- (a) the objecting party has the burden of presenting evidence of: (1) the occurrence of misconduct and/or irregularities, and (2) that such misconduct or irregularities interfered with the employees' free choice, and
- (b) once that burden has been met, this Board will then look at the totality of the circumstances occurring in each case --including the seriousness, the timing, any off-setting or remedial circumstances, and the cumulative effect, if any, of the misconduct or irregularities-- to determine

whether there was such a material effect on the employees' freedom of choice that the election results should be set aside.

In the instant case, the evidence did not establish misconduct by the Teamsters. However, in its discussion of the Teamsters' conduct, the majority opinion cites and refers to the NLRB's Midland rule at pp. 13-14, supra. The NLRB Midland rule deals with what type of misconduct could overturn an election result. Under Midland, the NLRB will not overturn an election for misleading campaign statements or misrepresentations unless the statements were obtained or done in a deceptive manner, such as by forgery. I am not persuaded that the Midland rule should be applied to election objection cases under EERA. Obviously, a party can engage in misconduct by way of misleading statements or misrepresentations without doing so deceptively or by way of forgeries. When there is misconduct -whether engaged in deceptively or not- which interferes with the employees' free choice, then the election result should be subject to overturning depending on the totality of the circumstances and whether the effect on the employees' freedom of choice was material. Clovis Unified School District (1984) PERB Decision No. 389.