No. 10-1075

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

E.A. SWEEN COMPANY

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The jurisdictional statement of E.A. Sween Company ("the Company") is not complete and correct. This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a Decision and Order of the Board that issued on December 24, 2009, and is reported at 354 NLRB No. 117.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Board's Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).[1]

This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), the unfair labor practices having occurred in Woodridge, Illinois. The Board's application for enforcement, filed on January 11, 2010, is

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[1] As the Company acknowledges (Br 13), this Court has upheld the issuance of decisions by the same two-member quorum. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (Nov. 2, 2009). The First, Second, Fourth, and Tenth Circuits have also upheld the issuance of decisions by the same two-member quorum. *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3629 (U.S. Apr. 15, 2010) (No. 09-1248); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). The D.C. Circuit has issued the only contrary decision. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). On November 2, 2009, the United States Supreme Court granted a writ of certiorari on the issue in *New Process* to resolve the conflict in the circuits, and argument was held on March 23, 2010.

timely; the Act places no time limit for filing actions to enforce Board orders.

The record in the Board's underlying representation proceeding (Case No. 13-RC-21777) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)) because the Board's Order is based, in part, on findings made in that proceeding. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions there for the limited purpose of deciding whether to enforce, modify, or set aside, in whole or in part, the Board's unfair labor practice order (29 U.S.C. § 159(d)). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court. *See River Walk Manor*, 293 NLRB 383, 383 (1989); *Medina County Publications, Inc.*, 274 NLRB 873, 873 (1985); *Deming Division, Crane Co.*, 225 NLRB 657, 657 n.3 (1976).

STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. The subsidiary issue is whether the Board acted within its discretion

in overruling the Company's single election objection, which alleged that the election results should be set aside because of a misrepresentation in a union campaign leaflet, and in certifying the Union as the employees' bargaining representative.

STATEMENT OF THE CASE

The Board found (D&O 2)[2] that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Teamsters Local Union No. 754, affiliated with the International Brotherhood of Teamsters ("the Union") as the certified collective-bargaining representative of an appropriate unit of company employees. The Company (Br 1-14) does not dispute that it refused to bargain, but instead contests the Board's conclusion that the election was conducted fairly. The Board's findings in the representation proceeding and the unfair labor practice proceeding, as well as its Decision and Order, are summarized below.

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[2] "D&O," "DCR," and "HOR" refer to the Board's Decision and Order, the Board's decision and certification of representative, and the hearing officer's report, respectively. "Tr" refers to the transcript of proceedings in the underlying representation case. "BDX" and "EX" refer, respectively, to the Board's and the Company's exhibits at that hearing. "UX" refers to the Union's exhibits that were attached to the motion for summary judgment in the unfair labor practice proceeding. References preceding a semicolon are to the Board's findings; those following refer to the supporting evidence.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

The Company provides food distribution services by truck, principally to Chicago-area 7-Eleven stores. (D&O 2; Tr 21.) On July 21, 2008, the Union petitioned the Board to conduct a representation election in an appropriate unit of all regular full-time and part-time truck drivers of the Company. (HOR 1 n.2; BDX 1.)

On August 28, the day before the election, the Union distributed to the Company's drivers a one-page leaflet on the prominent letterhead of "**TEAMSTERS LOCAL 754**," and bearing its logo. The leaflet is attached to this brief as an Addendum. The leaflet began:

TO ALL E.A. SWEEN DRIVERS:
'THE U.S. SUPREME [sic] HAS HELD THAT ALL EXITING [sic] TERMS AND CONDITIONS OF EMPLOYMENT BY LAW MUST REMAIN THE SAME UNTIL AND DURING CONTRACT NEGOTIATIONS OR APPROVED BY EMPLOYEES.'

THAT STATEMENT MEANS THAT IF YOU ARE DUE A SCHEDULED RAISE AT ANY TIME DURING THE CONTRACT NEGOTIATION PERIOD, BY LAW THE COMPANY **MUST** GIVE YOU THAT RAISE. IT IS UNLAWFUL FOR **ANY** COMPANY MANAGER, SUPERVISOR, OR HR REPRESENTATIVE TO TELL AN EMPLOYEE THAT DUE TO UNION ACTIVITY THAT EMPLOYEE WILL NOT RECEIVE THEIR RAISE.

* * * *

(Capitalization, emphases, single quotation marks, spacing, all in original.)

Pursuant to a stipulated election agreement approved by the Board's Regional Director, the Board conducted a secret-ballot election on August 29, 2008. (HOR 1.) The tally of ballots revealed that, of approximately 38 eligible voters, 27 cast ballots for and 6 cast ballots against the Union. There was also one challenged ballot, an insufficient number to affect the outcome of the election. (HOR 1 n.1; BDX 2.)

On September 5, 2008, the Company filed a timely objection to conduct affecting the results of the election. (HOR 2 & n.4.) That objection alleged that the Union had used "forged and misrepresented documents and quotes . . . attributed to the United States Supreme Court, the deceptive nature of which rendered the voters unable to recognize the propaganda for what it was." (HOR 2; BDX 1(a).)[3]

The Regional Director found that the Company's objection raised substantial and material issues of fact that warranted a hearing and issued a notice of hearing. (BDX 3 p.1.) On September 25, 2008, a Hearing Officer

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[3] The Company also filed another objection to the election alleging that a member of the Company's management team had engaged in organizing activities on behalf of the Union. However, that objection was withdrawn by the Company at the opening of the hearing and is not at issue here. (HOR 2 n.4; Tr 7-8.)

designated by the Regional Director held a hearing to resolve the issues raised by the Company's objection. On December 2, 2008, the Hearing Officer issued her report on objections recommending that the objection be overruled in its entirety and that the Board certify the Union as the employees' collective-bargaining representative. (HOR 4.) Thereafter, the Company filed with the Board exceptions to the Hearing Officer's report. (DCR 1-2.) On August 17, 2009, the Board issued its decision and certification of representative, adopting the Hearing Officer's findings and recommendations, and certifying the Union as the exclusive collective-bargaining representative of the employees in the stipulated unit. (DCR 1-2, BDX 5.)

B. The Unfair Labor Practice Proceeding

On about September 10, 2009, the Union requested that the Company bargain with it as the exclusive collective-bargaining representative of the certified unit of company employees. (D&O 2; UX 6.) Since October 6, 2009, the Company has failed and refused to bargain with the Union. (D&O 2; UX 7.)

On October 7, 2009, the Union filed an unfair labor practice charge with the Board, alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the

Union. (D&O 1.) On October 20, the Board's General Counsel issued an unfair labor practice complaint alleging that the Company unlawfully refused to bargain with the Union. The Company answered the complaint admitting its refusal to bargain, but disputing the propriety of the Board's certification of the Union. (D&O 1 n.1, 2 n.4.)

On November 10, 2009, the General Counsel filed a motion for summary judgment with the Board. The Board issued an order transferring the case to itself and directing the Company to show cause why the Board should not grant summary judgment. The Company did not respond to the General Counsel's motion. (D&O 1.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Liebman and Member Schaumber) issued its Decision and Order, granting the motion for summary judgment and finding that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). In reaching that conclusion, the Board found that the issues the Company raised in the unfair labor practice proceeding were or could have been litigated in the underlying representation proceeding. Further, the Board found that the Company neither offered to adduce any newly discovered or previously unavailable evidence, nor alleged the existence of any special

circumstances that would require the Board to reexamine the decision made in the representation proceeding. (D&O 1.)

The Board's Order requires the Company to cease and desist from refusing to bargain with the Union and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Company to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post copies of a remedial notice. (D&O 2-3.)

SUMMARY OF ARGUMENT

The Board acted within its discretion in overruling the Company's election objection. The Company contended that a single sentence in a union campaign leaflet, namely, "'THE U.S. SUPREME HAS HELD THAT ALL EXITING [sic] TERMS AND CONDITIONS OF EMPLOYMENT BY LAW MUST REMAIN THE SAME UNTIL AND DURING CONTRACT NEGOTIATIONS OR APPROVED BY EMPLOYEES[,]'" (single quotation marks in original) would be read by employees as both a quote from the Supreme Court and a quote that would lead employees to believe that, during the negotiation process, they could approve and get the substantial wage increases that the Union's campaign had been promising.

The Board will set aside an election where a party has used forged documents which render the voters unable to recognize propaganda for what it is. *Midland National Life Insur. Co.*, 263 NLRB 127 (1982). The Board's *Midland* rule reflects the Board's considered judgment that employees are capable of recognizing party propaganda as such. Here, the Union's leaflet bore all the earmarks of partisan propaganda. It prominently bore the Union's letterhead and logo and promoted the Union as the employees' defender. While the Board found that the disputed sentence in the leaflet did contain misleading information and was a misrepresentation of the Supreme

Court's holdings, there was no evidence that the sentence would have been reasonably read by employees in the way that the Company argues.

The quoted passage could not reasonably be read as a quotation from the Supreme Court itself. This is apparent given that the statement is cast in the third person and incorrectly refers to the Court as the "U.S. Supreme." Nor could the statement reasonably be read (Br 10) as "grant[ing to employees] the authority to decide future wage increases during negotiations[.]" Indeed, at the Board hearing on the Company's objection, the Company produced no employee witnesses in support of that view. Further, these employees, who had experienced another representation campaign just 3 years before, in which that union had promised wage increases and failed to deliver, likely would be skeptical of any union's claim that employees controlled their own fate and had the ability to approve their own wage increases.

Finally, this Court should reject the Company's urging that it apply the Sixth Circuit's exception to *Midland*. This Court has approved the Board's *Midland* rule and enforced the Board's application of that rule. However, even if the facts of this case were judged by the Sixth Circuit's exception, there would be no basis for setting aside this election, which the Union won by a 27 to 6 margin.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN OVERRULING THE COMPANY'S SINGLE ELECTION OBJECTION AND CERTIFYING THE UNION, MAKING PROPER THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

The Company admits that it has refused to bargain with the Union. Therefore, the Court must uphold the Board's conclusion that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)),[4] unless, as the Company argues, the Union was improperly certified. *Cross Pointe Paper Corp. v. NLRB*, 89 F.3d 447, 449 (7th Cir. 1996). As we show below, the Company's challenge to the Union's certification lacks merit.

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[4] Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," and Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." Section 7 (29 U.S.C. § 157), in turn, grants employees "the right to self-organization [and] to bargain collectively through representatives of their own choosing . . . ." A violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ," is "derivative" of a violation of Section 8(a)(5) of the Act. *See Painters Local 277 v. NLRB*, 717 F.2d 805, 808 n.4 (3d Cir. 1983).

A. Applicable Principles; the Board's *Midland* Rule

It is well settled that the Board is entrusted with a "wide degree of discretion" in shaping the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This includes the "discretion to set the rules for conducting elections and to determine what procedures suffice to protect the employees' right to choose." *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1162 (7th Cir. 1990). *Accord K-Mart Corp. v. NLRB*, 125 F.3d 572, 573 (7th Cir. 1997) (recognizing the Board's "discretion and expertise in assessing the impact of conditions surrounding an election"). "Rerunning elections, or litigating about their validity, may frustrate indefinitely the implementation of the employees' legitimate selection. Choosing how much imperfection to accept is for the Board." *NLRB v. Precise Castings*, 915 F.2d at 1164. *Accord NLRB v. Lovejoy Industries, Inc.*, 904 F.2d 397, 402 (7th Cir. 1990) ("The statute does not require the Board to treat employees as if they were bacteria on a petri dish that must be kept free of contamination.").

Nearly three decades ago, the Board in *Midland National Life Ins. Co.* announced that it "will not set elections aside on the basis of misleading campaign statements." 263 NLRB 127, 133 (1982). It will only "intervene

in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Id.* Accordingly, the Board "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." *Id.*

Midland is based on the premise that employees should be treated as "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." 263 NLRB at 132. Thus, the Board reasoned, employees are "aware that parties to a campaign are seeking to achieve certain results and to promote their own goals" and, "knowing this interest, [cannot] help but greet . . . claims made during a campaign with natural skepticism." *Id.*

The Board has squarely held that the holding and rationale of *Midland* are no less applicable to misrepresentations of law than to misrepresentations of fact. *See Metropolitan Life Ins. Co.*, 266 NLRB 507, 508 (1983). It has applied this principle even where the misrepresentation was an assertion, in a clearly partisan flyer, that the Board wanted the employees to have a union. *See TEG/LVI Environmental Services, Inc.*, 326 NLRB 1469, 1469 (1999), *affirmed mem.*, 221 F.3d 196 (D.C. Cir. 2000). The Board has further held that a misrepresentation in "the form of a bare

assertion of what the law . . . require[s]" does not render an election invalid. *United Steel Service, Inc. d/b/a UNISERV*, 340 NLRB 199, 200 (2003), *enforced mem*., 159 Fed. Appx. 611, 615 n.3 (6th Cir. 2005).

This Court has deferred to the Board's adoption and application of *Midland*. *See Uniroyal Technology Corp. v. NLRB*, 98 F.3d 993, 1003 (7th Cir. 1996); *NLRB v. Affiliated Midwest Hospital, Inc.*, 789 F.2d 524, 528-29 & n.3 (7th Cir. 1986). Other circuits have also approved *Midland*. *See, e.g.*, *Trencor, Inc. v. NLRB*, 110 F.3d 268, 275-76 & n.12 (5th Cir. 1997), and cases cited therein.

B. Standard of Review

The "conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse." *NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970). As a result, the Court's "review of the Board's determination [not to set aside an election] is deferential." *Overnite Transp. Co. v. NLRB*, 104 F.3d 109, 112 (7th Cir. 1997). *Accord NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 794 (7th Cir. 1991) ("[O]ur review of the Board's decision to certify a collective bargaining agent following an election is extremely limited.").

"[The Court] must defer to the Board's reasonable selection of rules and policies to govern the election, and . . . uphold the application of those rules if substantial evidence support[s] the Board's decision." *Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 784 (7th Cir. 1988). *Accord Clearwater Transport, Inc. v. NLRB*, 133 F.3d 1004, 1008 (7th Cir. 1998); *Mosey Mfg. Co., Inc. v. NLRB*, 701 F.2d 610, 614-15 (7th Cir. 1983).

C. The Board Acted within Its Discretion in Overruling the Company's Election Objection Alleging that the Union's Misrepresentation of a Supreme Court Decision Materially Affected the Election

1. The Board properly overruled the Company's election objection based on its *Midland* rule

The Company claims that the results of the election should be set aside because of the deceptive and misleading nature of the Union's campaign leaflet. To be sure, and as the Board found (HOR 3), the leaflet contains misleading information. The first sentence states that, during the period of contract negotiations, a change in wages may be "approved by employees." However, during contract negotiations, employees, as employees, do not have the authority to approve a change in wages that the employer may have offered at the bargaining table. That approval can only

come from the employees' chosen exclusive representative—the union.[5] Nevertheless, as we show below, the Board properly found (HOR 2-3) that there plainly is no warrant under the *Midland* standard for overturning the results of the election.

First, there is no basis for claiming, as the Company does (Br 12), that the Union's leaflet is a forgery.[6] The leaflet does not purport to be, nor could anyone reasonably construe it as, a facsimile of a Supreme Court opinion. Rather, the leaflet is clearly from the Union because, as the Board noted (HOR 3 n.6), it is printed on union letterhead and emblazoned with the Union's logo.

Nonetheless, the Company argues (Br 11-12) that employees would have been deceived by the quotation marks around the passage into believing that the passage was an accurate recitation of a Supreme Court

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[5] The second sentence of the leaflet stated that the leaflet's first sentence meant that, during contract negotiations, no approval was needed for a wage increase that was promised prior to the election. The Company does not take issue with the accuracy of this second sentence. *See Advo System Inc.*, 297 NLRB 926, 940 (1990); *Arrow Elastic Corp.*, 230 NLRB 110, 113 (1977), *enforced*, 573 F.2d 702 (1st Cir. 1978).

[6] Nor, contrary to the Company's contention (Br 12), can the quote be regarded as a "forgery" simply because it misstates the law. That view would eviscerate *Midland*. *See Metropolitan Life Ins. Co.*, 266 NLRB 507, 508 (1983), and cases cited a p. 14-15, above, holding that *Midland* applies to misstatements of law. The Company cites no case, Board or otherwise, that supports its expansive view.

statement. That too is meritless. In the leaflet, the passage appears in single quotation marks that is introduced with the statement, "THE U.S. SUPREME HAS HELD . . . ." Thus, it is clear to the reader that the entire quoted statement that follows reflects not the Supreme Court's view, but someone else's unattributed view of that holding.

Furthermore, under *Midland,* it is irrelevant that the Union's leaflet was not entirely accurate regarding what the Supreme Court said. As explained at pp. 13-15, above, under *Midland* the Board will not set an election aside because of the falsity of the representation, but only because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate a forgery for what it is. That is because the Board deems employees mature enough to recognize party propaganda for what it is—that is, the biased statements of a partisan to a disputed election. That reasoning seems particularly applicable here because, as explained above, the Union's letterhead and logo plainly identifies the author of the leaflet.

In addition, this unit of employees had prior experience with partisan representation campaigns. As the Company notes (Br 3), this unit had endured a partisan battle several years before between the Company and another Teamsters' local. These employees were undoubtedly familiar with

parties' exaggerated statements made in the course of such campaigns. Indeed, the Company claims (Br 4) that, in the course of that prior campaign, the union had made promises concerning wages that it could not keep.

The Company argues (Br 12) that the leaflet interfered with the election because the quoted passage "promised employees that they could continue to receive wage increases during negotiations if they approved of them." Specifically, it claims (Br 12) that the quoted passage amounted to a misrepresentation that the employees, presumably unilaterally, "controlled their own fate," and amounted to an unlawful promise of benefits. However, the Company presented absolutely no evidence that any employee so interpreted the language of the leaflet in this manner.

Moreover, even if the leaflet could be read as the Company urges, the Company's argument presumes, contrary to *Midland*, that employees would not recognize such a statement as partisan hyperbole. Even a novice employee knows that neither he nor the union can unilaterally set his wage rate. And these employees, who knew about the prior failure of another Teamster local to deliver on alleged promised wage increases, likely would be even less naïve. *See United Steel Service, Inc. d/b/a Uniserv*, 340 NLRB 199, 200 (2003), *enforced by unpublished opinion*, 159 Fed. Appx. 611 (6th

Cir. 2005) (finding no grounds for setting aside the election in the face of several misrepresentations, including one where an employee claimed in an affidavit that the union told him that "wages and benefits could only improve as a result of bargaining").[7]

Accordingly, the Board properly found no basis for setting aside the election under the *Midland* standard.

2. The Court should not apply the Sixth Circuit's exception to *Midland* but, even if it did, the Company's objection would be overruled

The Company also argues (Br 7-10) that, instead of applying *Midland*, the Court should follow the lead of the Sixth Circuit and create an exception to *Midland*, allowing elections to be set aside if "misrepresentations are so pervasive and deceptive that employees cannot separate the truth from falsehoods." (Br 8, quoting *Uniroyal Technology Corp. v. NLRB*, 98 F.3d 993, 1003 n.29 (7th Cir. 1996), which explained the Sixth Circuit's view.) However, as noted above, page 15, this Court and others have accepted the

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[7] *Pearson Education, Inc. v. NLRB*, 373 F.3d 127, 131 (D.C. Cir. 2004), cited by the Company (Br 12), does not hold that such an ambiguous statement, as the Union's here, is ground for setting aside the election. In that case the employer circulated a leaflet threatening to withhold a promised wage increase if the union won the election. The court noted that it was "settled law" that for an employer "to state that a previously announced wage increase will be lost if a union wins [the election] constitutes employer coercion." *Id.*

Board's *Midland* rule, and for good reason. Because the Act does not address the subject of campaign misrepresentations, and because the Board's *Midland* standard has been accepted as a reasonable interpretation of the Act, courts may not substitute their own standard for the Board's, even if they would have preferred a different standard in the first instance. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996).

Nonetheless, even if the Court analyzes the Company's election objection under the Sixth Circuit's exception to the *Midland* rule—which it should not—the objection should not be found to have merit. The Sixth Circuit, in *NLRB v. St. Francis Healthcare Ctr*., 212 F.3d 945 (6th Cir. 2000), sets out a five-factor test for determining whether a party's misrepresentation is "so pervasive and the deception so artful that the employees will be unable to separate truth from untruth . . . ." *Id*. at 964.[8] Those factors are: "(1) the timing of the misrepresentation; (2) whether the employer had an opportunity to respond; (3) the nature and extent of the misrepresentation; (4) whether the source of the misrepresentation was

[8] Arguably the *St. Francis* line of cases was not intended as a substantive change to the Board's *Midland* misrepresentation rule, but instead is a procedural rule to determine if a party that alleges a misrepresentation is entitled to a hearing. *See NLRB v. Gormac Custom Mfg., Inc.*, 190 F.3d 742, 747-50 (6th Cir. 1999) (applying the exception to the *Midland* test to determine employer's right to a hearing); *St. Francis*, 212 F.3d at 964-66 (same). In this case, the Company received a hearing on its objection.

identified; and (5) whether there is evidence that employees were affected by the misrepresentation." *Id*. The Sixth Circuit also considers the closeness of the election. *See NLRB v. Gormac Custom Mfg., Inc.*, 190 F.3d 742, 747 (6th Cir. 1999).

Even if the *St. Francis* factors applied, they do not support the Company's effort to overturn the election. Indeed, four of the *St. Francis* factors can readily be disposed of, and the fifth and sixth—the nature and extent of the misrepresentation and the closeness of the election, respectively—undermine the Company's claim that the election was materially affected.

Two of the factors that can be readily disposed of are "timing of the misrepresentation" and "whether the employer has an opportunity to respond." Although, as the Company notes, the leaflet was distributed on the eve of the election, the record does not support the Company's claim (Br 9) that it had no opportunity to respond. The record shows that the Company learned of the drivers' receipt of the leaflets in the early evening of August 28, the day before the election, before the drivers started their routes. Human Resources Manager Denise Forte learned of the distribution as early as 6:30 that evening, and sometime later so did Operations Manager Chris Nevels. Forte reported the matter to higher management that evening.

(Tr 37.) The election was not to be held until the next day from 2:45 to 3:30 p.m., and from 6:00 to 8:00 p.m. In addition, company counsel was present the day of the election. (EX 1, Tr 39.)

In these circumstances, the Company's claim (Br 9) that it had no time to respond to the Union's leaflet is unavailing. With the help of its on-site lawyer, the Company could have prepared a written response to any misstatement of law contained in the Union's leaflet, and distributed it to the drivers in advance of their voting. Nothing in Board law prohibits such last minute distribution of noncoercive information on an employer's part. *See Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1156 & n.1 (6th Cir. 1996) (specifically rejecting proposed rule that employers are presumptively unable to respond to misrepresentations made within 24 hours of an election). *Compare NLRB v. Milwaukee Brush Mfg., Co.*, 705 F.2d 257, 258 (7th Cir. 1983) (upholding Board's decision not to invalidate an election because of "last-minute, material misrepresentations").[9]

The third factor, the "nature and extent of the misrepresentation," is far less helpful to the Company than its brief suggests. The Company

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[9] Contrary to the Company's implication (Br 9), although Board law prohibits employers from holding "captive audience" speeches within 24 hours of the election, it does not bar employers from electioneering, including distributing leaflets, on the day of the election. *See Tempo Discount Center*, 226 NLRB 40, 42 (1976).

contends (Br 10) that the quoted passage of the leaflet would have caused employees to believe that during negotiation they would "receive substantial wage increases if 'approved by employees'." Contrary to the Company's suggestion, the quoted passage of the leaflet would not tend to mislead employees into believing that they were the ultimate arbiters regarding whether the Company should implement a pay raise during negotiations, or that they, the employees, could unilaterally decide upon their entitlement to a wage increase.

The two paragraphs immediately following the quoted statement dispel that far-fetched interpretation. Those paragraphs explain what the quoted passage "means"—that is, that it pertains to "a *scheduled* raise." (EX 2, emphasis added.) According to the leaflet's own explanatory paragraphs, "if you are due a scheduled raise," the Company must follow through and "by law . . . must give you that raise." The next paragraph reinforces the point by adding that it is "unlawful" for any company agent to tell an employee that he will not receive "[his] raise" "due to union activity[.]" (EX 2.) In other words, the quote accurately explains that the Company cannot withhold or threaten to withhold a previously-promised pay raise if

the Union becomes the employees' collective-bargaining representative and is in the process of negotiating a collective-bargaining agreement.[10]

As for the fourth factor, "whether the source of the misrepresentation was identified," the Company incorrectly claims (Br 10) that the Union "identified[] falsely" "the source of the misrepresentation . . . as the Supreme Court." However, the Union did not make that claim. And, as shown above, viewed in context of the leaflet as a whole, a reasonable employee would not have read the quoted statement as one taken directly from a Supreme Court opinion. Moreover, the Union clearly identified itself as the source of the leaflet. After all, it was printed on stationary bearing the Union's name and logo in bold oversized type.

As for the fifth factor, the Company has not shown credible evidence that the "employees were affected by the misrepresentation." The Board noted (HOR 3) that the Company did not produce any employee witnesses to testify regarding how the employees understood the Union's leaflet. Rather, only company managers Forte and Nevels testified on behalf of the Company, claiming (Br 10) that "numerous employees who had previously volunteered that they [had] planned to vote for the Company in the election

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[10] Presumably the Company does not challenge the Union's explanation of the law because it is entirely accurate. *See Pearson Education, Inc. v. NLRB*, 373 F.3d 127, 131-32 (D.C. Cir. 2004).

claimed that they, and others, had switched their votes because of this flyer[.]" The Board reasonably found (HOR 3) that Forte's and Nevels' testimony was nothing more than "unsubstantiated hearsay" and entitled to little weight. *See NLRB v. Lake Holiday Assoc., Inc.*, 930 F.2d 1231, 1236 (7th Cir. 1991) ("[W]e see no reason why the Hearing Officer had to credit . . . hearsay testimony[.]"). Moreover, the Board traditionally does not consider employees' post-election statements concerning their reasons for voting as they did in determining whether an election should be set aside. *See G.H.R. Foundry Div., The Dayton Malleable Iron Co.*, 123 NLRB 1707, 1709 (1959).[11]

A final factor cutting against the Company is that this election was not close. The Union won the election by a 21-vote margin of 27 to 6. *See NLRB v. Erie Brush Mfg. Corp.*, 406 F.3d 795, 805 (7th Cir. 2005); *Overnite Transp. Co. v. NLRB*, 104 F.3d 109, 115 (7th Cir. 1997). That overwhelming expression of employee choice should not be lightly set aside.

In sum, the Company presents no basis for setting aside the results of this election.

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[11] For similar reasons, the Company's repeated claim (Br 3) that the Union's statement in its leaflet caused the employees to believe that "Company representatives were liars" is unavailing. This claim is also predicated on the hearsay testimony of Forte and Nevels, rather than that of the employees themselves.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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May 2010

H:E.A.Sween-brief-recy

ADDENDUM

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TEAMSTERS LOCAL 754

ORLANDO FULLER (773) 991-1144
LOCAL 754

RAMON WILLIAMS (708) 514-2098
JOINT COUNCIL 25

TO ALL E.A. SWEEN DRIVERS:
'THE U.S. SUPREME HAS HELD THAT ALL EXITING TERMS AND CONDITIONS OF EMPLOYMENT BY LAW MUST REMAIN THE SAME UNTIL AND DURING CONTRACT NEGOTIATIONS OR APPROVED BY EMPLOYEES.'

THAT STATEMENT MEANS THAT IF YOU ARE DUE A SCHEDULED RAISE AT ANY TIME DURING THE CONTRACT NEGOTIATION PERIOD, BY LAW THE COMPANY **MUST** GIVE YOU THAT RAISE.

IT IS UNLAWFUL FOR **ANY** COMPANY MANAGER, SUPERVISOR OR HR REPRESENTATIVE TO TELL AN EMPLOYEE THAT DUE TO UNION ACTIVITY THAT EMPLOYEE WILL NOT RECEIVE THEIR RAISE.

IT IS UNLAWFUL FOR **ANY** COMPANY MANAGER, SUPERVISOR, OR HR REPRESENTATIVE TO ASK YOU HOW YOU INTEND TO VOTE.

TEAMSTERS LOCAL 754 WILL PROTECT ITS MEMBERS AT ALL COSTS.

TEAMSTERS LOCAL 754 WILL NOT HESITATE TO FILE CHARGES AGAINST ANY MEMBER OF MANAGEMENT FOR VIOLATING ANY OF THESE RIGHTS AFFORDED TO THE DRIVERS OF E.A. SWEEN.

TEAMSTERS LOCAL 754 STRONGLY URGES ANY EMPLOYEE THAT HAS BEEN SUBJECTED TO ANY OF THESE VIOLATIONS TO CONTACT ORLANDO FULLER OR RAMON WILLIAMS IMMEDIATELY.

Case No. 13-RC-21777
Official Exhibit No. E-2
Disposition of Exhibit ____ I.D. Y
Rejected ____ Received P
In The Matter of
E.A. SWEEN Co.
Date 8-25-08 Reporter A.H.

E-2

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner	:	
	:	Case No. 10-1075
	:	
v.	:	Board Case No.
	:	13-CA-45563
E.A. SWEEN COMPANY	:	
	:	
Respondent	:	
	:	

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that the following participant in the case is a registered CM/ECF user and that service will be accomplished by the CM/ECF system.

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Dated at Washington, D.C.
This 20th day of May, 2010

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	No. 10-1075
	)	
	)	
v.	)	Board Case No.
	)	13-CA-45563
E.A. SWEEN COMPANY	)	
	)	
Respondent	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5,825 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 20th day of May, 2010