

VERMONT LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS LOCAL #98 (The "Union"))	
)	DOCKET NO. 80-11
and)	
)	
TOWN OF SPRINGFIELD (The "Employer"))	

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS LOCAL #98)	
)	DOCKET NO. 80-29
v.)	
)	
TOWN OF SPRINGFIELD)	

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS LOCAL #98)	
)	
and)	DOCKET NO. 80-30
)	
VERMONT LABOR RELATIONS BOARD)	
(The "Board"))	

ORDER OF NONCERTIFICATION, MEMORANDUM AND NOTICE OF
DECLINATION TO ISSUE UNFAIR LABOR PRACTICE COMPLAINT

The above-captioned matters came before the Board in connection with a Petition for Election of Collective Bargaining Representative filed by the Union on February 5, 1980 (Docket No. 80-11). Through that petition the Union seeks exclusive bargaining representative status for certain maintenance and service employees of the Employer's Department of Public Works and Sewer Department.

SUMMARY OF FACTS

1. By letter dated March 24, 1980, from Chairman of the Board of Selectmen Michael Knoras, filed with the Board on March 26, 1980, agreement between the Employer and the Union as to the proposed bargaining unit was indicated and a consent election requested.

2. Thereafter, on March 26, 1980, a Notice of Consent Election scheduled for April 2, 1980, was forwarded from the Clerk of the Board to the Employer and Union representatives, Michael Knoras (Chairman, Board of Selectmen) and Michael Valuk (Town Manager), and Robert Clark (Union Business Agent).

3. On April 2, 1980, Board member William G. Kemsley, Sr. conducted the election as scheduled, in accordance with the agreed upon checklist. Mr. Paul Ruse observed the balloting for the Employer while Rupert Millette observed for the Union.

4. At about halfway through the voting, Board agent Kemsley observed that several of the unmarked ballots were defective in that there was no box (☐) adjacent to the "NO UNION" line of the ballot. At that same time, one of the voters approached Mr. Kemsley and related that fact.

5. The voter was given a nondefective ballot and the voting was allowed to continue.

6. At the conclusion of the balloting, prior to opening the ballot box to determine the results, Mr. Kemsley explained to observers Ruse and and Millette, Richard Whitney and Robert Clark that several voters possibly received defective ballots. The ballots were then counted.

7. Thirty employees voted in the election, with the following results:

Union	15
No Union.	11
* Defective Ballots .	4 (All of which had marks in the Union box)

8. At this point, after the parties had been informed of the election results, Employer observer Ruse and Union Business Agent Clark objected to the election on account of the defective ballots.

9. Mr. Kemsley then indicated that the election should be set aside and a new one scheduled. Both the Union and the Employer agreed.

10. On April 3, 1980, the full Board of Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown ordered that a new election be held on April 7, 1980 "(i)n view of the irregularities in ballots used for the election held on April 2, 1980."

11. Also on April 3, 1980, a written communication from the Employer, directed "To All Springfield Department of Public Works Employees," was distributed among those employees, which "letter" is appended to this order.

12. Board agent Kemsley established no provisions regarding electioneering during the interim between elections.

13. On April 7, 1980, a second election was held with proper ballots. The same observers were present. At the conclusion of balloting, it was determined that twenty-eight employees voted with the following results:

Union 13
No Union. . . 15

14. By letter dated April 8, 1980, from Robert Clark, Union Business Agent, filed with Board on April 11, 1980, the Union charged the Employer committed an unfair labor practice (Docket No. 80-29) in violation of 21 V.S.A. §1726(a)(1), by its distribution on April 3, 1980, of an alleged "intimidating communication" (see finding #11, infra).

15. Also filed on April 11, 1980, by letter dated April 8, 1980, from Robert Clark, was a complaint regarding the Board's decisions to set aside the initial representation election of April 2. At this time, the Union

requested that the Board certify the results of the April 2 election and disregard the results of the April 7 election.

16. Consequently, on May 22, 1980, the Board issued a Notice of Investigation of Charges and ordered the parties to submit memoranda of law and a summary of pertinent facts on the following issues:

"1. Was the Vermont Labor Relations Board in error when it set aside the results of the election held April 2, 1980, and if so, should the results of that election be certified as the outcome?

2. If the Board concludes that voiding the election of April 2, 1980, was correct in law and in fact, should the results of the election held on April 7, 1980, be certified; or should those results be set aside because of employer communication violating 21 V.S.A. §1726(a)(1) and not excused under 21 V.S.A. §1728?"

17. Memoranda were submitted by Mr. Clark, representing the Union, and Allan Drachman, counsel for the Employer, on May 7 and May 9, 1980, respectively.

MEMORANDUM

As a result of our investigation, the pleadings and memoranda submitted by the parties, legal research, and reports of Board agent Kemsley who conducted the elections in question, we will certify the results of the April 7 election and decline to issue an unfair labor practice complaint against the Employer for the following reasons.

A strict construction of 21 V.S.A. §1724(e), which provides that:

"(i)n determining the representation of municipal employees in a collective bargaining unit the board shall conduct a secret ballot of the employees and certify the results of the interested parties and to the employer. The original ballot shall be so prepared as to permit a vote against representation by anyone named on the ballot. No representative will be certified with less than a 51 percent affirmative vote of all votes cast."

compels us to conclude the Board has the authority, and in this case was correct, in setting aside the initial election results. We would find this so irrespective of the parties' acquiescence to that decision. Several of the ballots were defective under this statutory language, insofar as some did not permit a vote against Union representation in the same manner in which a vote for representation could be marked.

Nor do we think the results of the April 7 election should be voided because of the Employer's distribution of written "campaign propaganda." While it appears the Employer may have used the hiatus between elections to their advantage more effectively than did the Union, it did not do so illegally. In carefully scrutinizing the communication alleged as "intimidating," the "Questions and Answers on the Union," we find "no threat of reprisal or promise of benefit" which would constitute evidence of an unfair labor practice prohibited by 21 V.S.A. §1726(a)(1). Although it is replete with Employer "views, argument and opinion," those expressions in and of themselves are protected by 21 V.S.A. §1728, which states:

"Freedom of expression

The expression of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, oral or visual form, shall not constitute or be evidence of an unfair labor practice under this chapter, if such expression contains no threat of reprisal or promise of benefit."

The content of the Employer's communication here consists mainly of qualified predictions and some pedantic puffery, within the prescribed limits on employer speech.

We have reviewed relevant National Labor Relations Board and other State Labor Board decisions in search of a just and workable standard of review for evaluating representation election propaganda. The task is to

balance the right of the parties to wage free and vigorous election campaigns against the right of employees to make an untrammelled choice of their bargaining representative. We find persuasive Shopping Kart Food Market, 228 NLRB No. 190, 94 LRRM 1705 (1977). The rule in that case assumes that employees are mature individuals, capable of recognizing and discounting campaign propaganda for what it is. On this basis, in keeping with the Shopping Kart standard, we will not engage in extensive analysis of campaign communications in order to ascertain a particular statement's truth or falsity. Rather, we will only intervene if the method of misrepresentation renders employees unable to recognize campaign material for what it is, for example, by misuse of Board processes or documents.

We concur with our sister agencies in Connecticut and Florida whose respective State Labor Relations Board and Public Employee Relations Commission have rejected an earlier NLRB standard known as the Hollywood Ceramics doctrine. In Hollywood Ceramics Co., 140 NLRB No. 36, 51 LRRM 1600 (1962), the National Board ruled that an election would be set aside only in cases where there was a substantial misrepresentation of truth, delivered at a time which prevented an effective reply. In embracing in its stead the Shopping Kart doctrine, the Connecticut Board criticized the assumptions underlying Hollywood Ceramics as paternalistic in an otherwise democratic society, where campaign rhetoric is rampant and easily recognized. See City of New Haven and International Brotherhood of Police Officers, N.A.G.E., and AFSCME, Council #15, Connecticut State Board of Labor Relations decision No. 1760, June 1, 1979.*

The Florida Commission echoed the same reasons given by the National Board in rejecting the Hollywood Ceramics doctrine in its Shopping Kart decision. Primarily, that standard encouraged frivolous litigation and

resulted in delays in finalizing election results. In a 1979 decision involving the Leon County Board of County Commissioners, 1 NPER 10-10354, the Florida Commission further commented on this point and concluded that:

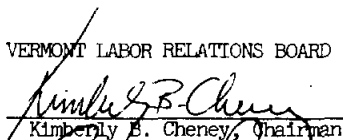
"judging the probable effect of an alleged misrepresentation on an election after the fact, was simply too speculative to outweigh the policies encouraging free speech and the finality of election results -- unless the alleged misrepresentation contravened statutory policies, such as prohibitions against threats of reprisal or force." "Evaluation of Campaign Propaganda," William Maikovich, Asst. National Editor, National Public Employment Reporter, Vol. 2, No. 1, January, 1980.

ORDER

As a result of the election of April 7, 1980, it is hereby ORDERED that there be NO CERTIFICATION of the International Union of Operating Engineers, Local #98, as the exclusive bargaining representative of the eligible employees of the Town of Springfield, Department of Public Works and Sewer Department.

Dated this 5th day of June, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


Robert H. Brown

William G. Kemsley, Sr., did not participate in this decision.

TO ALL SPRINGFIELD DEPARTMENT OF PUBLIC WORKS EMPLOYEES

On Wednesday, April 2, 1980, the Vermont State Labor Relations Board conducted a secret ballot election to determine whether you would be represented by the International Union of Operating Engineers for the purpose of collective bargaining. That election was voided because of ballot irregularities and a new election has been rescheduled for Monday, April 7, 1980 at 2:45 P.M.

We do not believe a union is needed here. The Board of Selectmen has consistently supported your 1980 pay raise.

We believe that restrictive union practices and union hassles would be a step backward. Without outside interferences we are continuing to make progress.

Included is a list of questions and answers so that you and your family can think hard about what you have now without a union and what you would be risking if a union came in.

QUESTIONS AND ANSWERS ON THE UNION

- QUESTION: Does it cost money to belong to the International Union of Operating Engineers?
- ANSWER: Yes, the union collects regular dues and besides that, there would be a lot of other fees such as assessments and contributions.
- QUESTION: Will the union give me job security?
- ANSWER: No, the union can promise, but only the Town can deliver.
- QUESTION: If the union comes in will I have to join the union and pay dues or pay the equivalent of dues?
- ANSWER: One of the first things the union will probably demand is a contract requiring all employees to join and pay dues, or to pay an amount equal to dues. If you do not join the union, if you don't pay, the union could ask us to fire you.
- QUESTION: If I signed a union card or petition, or if I voted for the union in the voided election, which was set aside, or if I did not vote in that election, can I vote against the union in the election scheduled on Monday, April 7, 1980 at 2:45 P.M.?
- ANSWER: Yes, you certainly can vote against the union. I certainly hope that you do. Believe me, it doesn't make any difference if you signed a union card or went to union meetings, or voted for the union in the election which was set aside, what you signed or told anyone, or how you voted in the previous election will not count in the new election. This ballot is strictly secret and no one will ever know how you voted. You can vote against the union and I sure hope you do.
- QUESTION: If the union comes in, will we get everything the union has promised us?
- ANSWER: Unions cannot guaranty you anything, they cannot even guaranty that in a contract you will get the benefits you now have. Whether you still have the benefits you now have after a contract is negotiated would depend entirely on what takes place in the negotiations. Often, as a result of "collective bargaining" many employers are forced to drop important and worthwhile benefits in order to cover the additional costs of expensive union practices.

VERMONT LABOR RELATIONS BOARD

Do you wish to be represented for exclusive bargaining purposes by:

International Union of Operating Engineers,
Local 98, AFL-CIO



No union

Please indicate your choice by placing an "X" in the proper square, then fold your ballot and place it in the ballot box.

VERMONT LABOR RELATIONS BOARD

Do you wish to be represented for exclusive bargaining purposes by:

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