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Labor and Employment Law

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INTRODUCTION

This survey reviews some of the noteworthy cases in the area of labor and employment law decided by the Sixth Circuit during 1996. In the judgment of the author, while it cannot be fairly said that 1996 was an important year in the development of doctrine in labor law, it may be said that the court continued to view the decisions of the National Labor Relations Board ("NLRB" or "the Board") with care and, indeed, considerable skepticism.

The one area of law in which the court unabashedly distanced itself from the NLRB was in the area of campaign regulation. In *Dayton Hudson Department Store Co. v. NLRB*[1] and *Mitchellace, Inc., v. NLRB*,[2] the Sixth Circuit, as it did last year,[3] plainly stated that it would review allegations of campaign misrepresentations much more exactingly than the NLRB currently undertakes. This departure will undoubtedly provide for more litigation and uncertainty about the finality of union elections in the Sixth Circuit than in other circuits which have embraced the NLRB's hands-off approach to the regulation of rhetoric during union organizing campaigns.

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1. 79 F.3d 546 (6th Cir.), *cert. denied*, 117 S. Ct. 73 (1996).
2. 90 F. 3d 1150 (6th Cir. 1996).
3. *See* NLRB v. Hub Plastics, Inc., 52 F.3d 608 (6th Cir. 1995); *see also* McCormick, *Labor and Employment Law*, DET. C.L. REV. 497, 502 (1996).

I. CASES AND ANALYSIS

A. *Vemco, Inc. v. NLRB*[4]

This case involved issues surrounding the statute of limitations under the National Labor Relations Act[5] ("the NLRA" or "the Act") as well as the nature of protected, concerted activity under that statute.

The facts of the case were straightforward. Anna McMurtry, an employee in Vemco's ("the Company") assembly department, distributed copies of a document regarding the certification of the United Auto Workers ("UAW") in the Company's locker room area. She also placed copies of the document in the break room. Thereafter, she was summoned to the office of David Maxwell, the Company's Human Resource Manager, who told her she could not distribute the documents on Company property. According to Ms. McMurtry this conversation took place on December 6, 1991. Mr. Maxwell, on the other hand, testified that it took place on November 20, 1991. In addition to this testimony, the Company introduced a note written by Mr. Maxwell regarding this conversation which was dated November 20, 1991.

The Administrative Law Judge ("ALJ") credited Ms. McMurtry and found that the disputed conversation took place on December 6, 1991. The NLRB affirmed the ALJ's decision. This finding brought the unfair labor practice allegation within the six month statute of limitations. Under Section 10(b) of the NLRA,[6] a person charging an unfair labor practice must do so within six months of the alleged infraction.

The court of appeals overturned the Board's determination. Disagreeing with the characterization that the ALJ had made a credibility resolution, the Court determined that substantial evidence supported only one scenario: that the conversation in question occurred on November 20, 1991.

Regarding the alleged protected activity, the facts revealed that on the morning of Monday April 20, 1992, employees discovered that their work area was inaccessible because racks, boxes and other items had been moved into the work area. Crews had taken advantage of the three day Easter weekend to paint the floor. Thereafter, nine employees were persuaded by their Union representative that it was "'impossible to work, that the area was unsafe, and that the employees should all go home.'"[7] These nine employees were disciplined by the Company.

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4. 79 F. 3d 526 (6th Cir. 1996)
5. 28 U.S.C. § 158 (1994).
6. 29 U.S.C. § 160(b) (1994).
7. *Vemco*, 79 F.3d at 530.

The question in this case was whether the employees' actions were "protected" within the meaning of the Act. The ALJ and the NLRB found that they were. The court of appeals, however, disagreed. Pointing out that none of the employees were required to work under the conditions and that they were nevertheless paid for the time they were present but unable to work, the court found the activity to be outside the protection of the statute. The circumstances of the case, the court said, were distinguishable from those present in *NLRB v. Washington Aluminum Co.*[8] where employees engaged in a spontaneous work stoppage to protest very cold working conditions. Unlike that case, where employees were protesting working conditions, the employees in this instance were not required to work at all until the area was cleared. Consequently, the court reasoned, this activity, while "concerted" was nevertheless not "protected" by the statute.

Two aspects of the court's decision are noteworthy. First, despite their protestations to the contrary, the court, in essence, overruled the ALJ's credibility determination that the conversation between McMurtry and Maxwell took place as McMurtry testified. Although the court characterized their decision as one in which all of the evidence supported a contrary opinion, the ALJ, in fact, credited one witness' recollection over another's. By reversing the ALJ's decision, then, the court in fact overturned the trier's judgment as to the credibility of witnesses offering conflicting testimony. Second, the decision is interesting because of the court's commentary upon the inherently opaque nature of "protected" activity. Here, the employees engaged in concerted activity to protest working conditions. Nevertheless, the court found it sufficiently reprehensible under the circumstances of the case as to take it outside the ambit of the Act's protection.

B. *Bromley v. Michigan Education Ass'n*[9]

The plaintiffs in this case were seven members of the faculty of Central Michigan University together with ten public school teachers and one educational support person. Although they were represented for purposes of collective bargaining by the respondent, Michigan Education Association ("MEA" or "the Association"), some of the plaintiffs were not actually members of the Association. Consequently, they challenged certain fees charged them by the MEA inasmuch as they were not members of that association.

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8. 370 U.S. 9 (1962).
9. 82 F.3d 686 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997).

The fees in question were established by contract between the MEA and the school boards employing the plaintiffs. Under Michigan law[10] the plaintiffs' employers reached agreements with the MEA requiring plaintiffs and all other non-union employees to pay service fees to the MEA. These fees were based upon so-called "chargeable" costs incurred the year before. The plaintiffs alleged, however, that the amount collected by the MEA abridged their First Amendment rights because part of the fees were expended for political, ideological and other activities not germane to collective bargaining.

During discovery, the plaintiffs sought the identification of the persons who had calculated the fees in question as well as the documents supporting their calculation. Discovery was stayed after the MEA provided the record of a service fee arbitration in which an arbitrator decided that the service fees exacted from the plaintiffs did not violate their First Amendment rights. Although the arbitrator in that matter had not actually seen the documents underlying the union's calculation, the MEA nevertheless sought summary judgment on the ground that the arbitral award was entitled to great weight in the constitutional challenge. The district court granted the motion.

On appeal, the court of appeals recognized that although agency shop agreements necessarily abridge First Amendment freedoms in some respects, the constitutional compromise rendered by the Supreme Court permits public employers and unions to enter into such agreements so that unit employees may be required to bear the cost of collective bargaining activities. This approach denies non-union employees a "free ride" to benefit from such activities while not requiring them to subsidize ideological activity to which they object. Under Supreme Court doctrine, the test in such a case is whether the challenged expenditure was reasonably incurred for the purpose of performing the duties of a collective bargaining representative. Under this formula, objecting employees may be compelled to pay their fair share of direct costs of negotiating and administering a collective bargaining contract and settling grievances as well as the costs of activities reasonably used to implement or effectuate the duties of the union as exclusive representative.

Under the Supreme Court of the United States' decision in *Chicago Teachers Union v. Hudson,*[11] public employers and their unions may agree to arbitrate the question of whether dues and fees are permissible. Such arbitration decisions, although entitled to "great weight," do not have preclusive effect in any subsequent action brought under 42 U.S.C. § 1983.

In this instance, the court of appeals was not persuaded that the district court was justified in accepting the arbitrator's endorsement of the union's

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10. *See* MICH. COMP. LAWS ANN. § 423.210 (West 1995).
11. 475 U.S. 292 (1986).

cost allocations without allowing employees' request for discovery of the materials on which the calculations were based. In essence, the arbitrator relied on summaries of documents not presented in evidence or made available for inspection by employees prior to arbitration. And, given the significance of the constitutional interests at stake, the court concluded, the district court should not have granted the union summary judgment without allowing meaningful discovery.

As to the underlying dispute, the plaintiffs argued that two categories of expenditures ought to have been held non-chargeable as a matter of law: expenditures for "extra-unit litigation" and for "defensive organizing." Extra-unit litigation means litigation not directly concerning the unit where the objecting employee works. Under *Reese v. City of Columbus*,[12] the Sixth Circuit held that extra-unit litigation costs are in fact chargeable. Defensive organizing includes activities designed to protect and strengthen the status of recognized or certified unions, including membership retention efforts and resistance to decertification proceedings. Regards these costs, the Sixth Circuit ruled that defensive organizing serves only the union's self-interest in perpetuating itself as the bargaining unit representative - a goal not germane to collective bargaining activity and one which may add to First Amendment burdens.

For these reasons, the court of appeals vacated the district court's summary judgment order and remanded the matter for further proceedings.

C. *Smiths Indus., Inc. v. NLRB*[13]

This case raised an interesting and important question of law regarding the effect of an established past practice following the expiration of a collective bargaining agreement. Under the NLRA, once a collective bargaining agreement has expired, past practices may represent the status quo between the parties.[14] Upon impasse in negotiations, however, an employer may unilaterally change established practices, so long as the change is consistent with the employer's final offer of settlement to the union.[15] Here, Smiths Industries ("the Company") final offer of settlement to the union contained language from the Parties' prior contract that was inconsistent with the past practice that had developed under that contract. Thus, the question arose as

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12. 71 F.3d 619 (6th Cir. 1995), *cert. denied*, 117 S. Ct. 386 (1996).
13. 86 F.3d 76 (6th Cir. 1996).
14. *See* Sacramento Union, 258 N.L.R.B. 1074 (1981).
15. *See* Borden, Inc. v. NLRB, 19 F.3d 502, 512 (10th Cir. 1994); *see also Sacramento Union*, 258 N.L.R.B. at 1075.

to the status of the established practice once the contract expired and the Company unilaterally invoked the terms of the prior contract.

In February 1994, Mitchner, a supervisor, instructed several employees under his supervision to move certain products to another department. Decker, a union steward, complained that this was not bargaining unit work. Mitchner responded that this assignment was specifically permitted under a letter of agreement between the Company and the union.

Later, Decker said he intended to grieve the matter and announced he was going to the union office to investigate the matter. Mitchner instructed Decker that he was not allowed to go to the union office for that purpose. This response was predicated on a provision in the collective bargaining contract that restricted access by union stewards to the union office to those occasions when their presence was requested by a committeeman. Thus, Mitchner directed Decker to return to his work station and to write out a grievance or return to work. Although Decker did not press the matter that day, the following day he told Mitchner he was going to the union office over this grievance. Mitchner reiterated his instruction of the previous day that Decker should return to his work station and write a grievance or return to work. This time, Decker disobeyed the order and proceeded to the union office. He was suspended for three days.

The UAW ("the Union") filed section 8(a)(1), (3) and (5) charges against the company. The contract between the parties stated that the company would provide a work area for the shop committee person and the President. Stewards could utilize the area only when a committeeman requested the steward to investigate a grievance. Notwithstanding this language, the ALJ sustained the union's charges, reasoning that the company had a long established practice of allowing stewards to visit the union office without such a request. The NLRB affirmed the ALJ's decision, concluding that the practice had become an implied term and a condition of employment. Consequently, the Board held, the company had made unilateral changes in the terms and conditions of employment without first negotiating with the union.

On appeal, the Sixth Circuit rejected the Board's conclusion as to the legal effect of the past practice. In this case, the court concluded, the collective bargaining contract had expired and the parties had negotiated to the point of impasse. At that point, the court observed, the company made its final offer to the union. The offer contained the language of the previous agreement restricting access to the union office. The conflict in this case arose after the

company's unilateral imposition of its final offer and, therefore, the court held, "past practices were no longer controlling."[16]

Having concluded that the Board made an error of law in finding that the Company violated sections 8(a)(1) and (5) and having further found that Decker was properly disciplined for insubordination, the court reversed the Board's decision and denied enforcement of its order.

D. *W.F. Bolin Co. v. NLRB*[17]

W.F. Bolin Company ("WFB" or "the Company") petitioned the court to set aside a decision of the NLRB finding that it laid off two employees, Wright and Kehl, for complaining about their wages and working conditions in violation of sections 8(a)(1) and (3) of the NLRA In September 1991, WFB, a painting contractor, hired painters from the hiring hall of Local 93 of the International Brotherhood of Painters and Allied Workers ("the Union"). During the course of a project to paint a middle school, disputes arose between WFB and its painters regarding the Company's compliance with the collective bargaining contract. The painters, led by Wright and Kehl, complained that WFB was not abiding by the contract in the areas of travel pay, extra pay for working with epoxy paint and the timely distribution of paychecks.

In November 1991, Minke, the Union Steward, raised the issue of travel pay with WFB's site foreman, Tisher. Minke handed Tisher a copy of the collective bargaining contract to show him that it provided for travel pay. Tisher, however, threw the contract on the floor without examining it. Later, Wright and Kehl also complained about travel pay. Kehl also complained to Tisher about not receiving extra pay for epoxy work and the distribution of paychecks at the work site.

On December 24, 1991, the employees met to discuss their complaints. Wright spoke about travel pay and Kehl acted as spokesperson regarding the other issues. Tisher was present at this meeting. Shortly thereafter, Minke, at Kehl's urging, asked WFB's Superintendent, Ring, about epoxy pay. Ring responded, "'If you guys keep complaining I'm going to fire the whole crew and bring in a whole new crew.'"[18]

On January 10, 1992, WFB determined that it needed only five painters instead of seven to complete the project and laid off Wright and Kehl, despite the fact that substantial work remained on the project. Although there was

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16. *Smiths Indus.*, 86 F.3d at 80.
17. 70 F.3d 863 (6th Cir. 1995).
18. *W.F. Bolin Co.*, 70 F.3d at 868.

credible evidence to the contrary, Tisher was clearly less qualified than the others to perform the remaining work.

In the ensuing unfair labor practice litigation, the ALJ found that although Ring's statement breached section 8(a)(1) of the Act, WFB did not lay off Wright and Kehl in violation of the Act. Upon review, the NLRB affirmed the ALJ's decision with respect to Ring's statement, but reversed the decision regarding the lawfulness of the layoffs. With respect to the layoff decision, the NLRB found that Ring's unlawful remark evidenced animus toward the protected activities of Wright and Ring. The Board also relied on Tisher's having thrown down the contract as evidence of hostility toward the employees' protected activities. Finally, the Board concluded that WFB had failed to show that but for the protected activity, Wright and Kehl would have been laid off in any event.

The court of appeals affirmed the decision of the NLRB, following the approach approved by the Supreme Court of the United States in *NLRB v. Transportation Management Corp.*[19] Under that approach, once the general counsel has established a prima facie case that anti-union animus constituted a substantial or motivating factor in the layoff, the burden shifts to the employer to establish that the employee would have been laid off even if he or she had not engaged in the protected activity.[20]

As described above, the court concluded that the NLRB had met its initial burden and that WFB had failed to rebut the prima facie case. Extending deference to the NLRB under the "substantial evidence" standard, the court enforced the Board's order and denied WFB's petition for review.

E. *Carrington South Health Care Center, Inc. v. NLRB*[21]

In this matter, employees of the Carrington South Health Care Center ("the Center") voted to be represented by a union. The Center, however, filed objections to the election on the ground that the Union engaged in racially inflammatory appeals. The regional director overruled the objection, without conducting a hearing, and the NLRB refused to review the Regional Director's decision. Thereafter, the Center refused to bargain with the union in order to challenge the legitimacy of the election.

The Center essentially complained about three cartoons and one quote that appeared in the union's campaign literature. The first cartoon depicted a white man flipping a coin and saying "'I'll take a dozen'" while a group of

19. 462 U.S. 393 (1983).
20. *Transportation Management*, 462 U.S. at 398-403.
21. 76 F.3d 802 (6th Cir. 1996).

employees looked on.[22] Many of the workers were clearly intended to appear black. The second cartoon depicted a group of people laboring to pull a wagon which carried a person brandishing a whip. The caption had the driver saying, "'You are employed at my Will!!!'"[23] The third cartoon showed a white "boss" pointing a nervous looking black employee to an electric chair, stating "'You don't need you union rep. Just have a seat and we'll discuss your grievance like two rational human beings.'"[24]

The quote in controversy came from a famous speech by Dr. Martin Luther King, Jr. which said,

> We've got some difficult days ahead. But it really doesn't matter with me now. Because I've been to the mountain top. Like anybody, I would like to live a long life. Longevity has its place. . . But I'm not concerned about that now. I just want to do God's will!
>
> And He's allowed me to go up to the mountain. And I've looked over, and I've seen the Promised Land. I may not get there with you, but I want you to know tonight that we as a people will get to the Promised Land.
>
> So I'm happy tonight. I'm not worried about anything. I'm not fearing any man. 'Mine eyes have seen the glory of the coming of the Lord.'[25]

Under the NLRA, a regional director must conduct a hearing on objections to an election if the objecting party "'raises substantial and material factual issues and proffers evidence that establishes a prima facie case for setting aside the election.'"[26] Moreover, the court ruled, an election must be set aside "when the objecting party demonstrates that pre-election conduct 'seeks to overstress and exacerbate racial feelings' through a deliberate appeal to racial prejudice."[27]

The Court also looked to the seminal case of *Sewell Manufacturing Company.*[28] as setting forth the relevant test in cases of this variety. There, the NLRB ruled that the party making racially based statements has the burden of demonstrating that the statements were truthful and germane, with doubts to be resolved in favor of the objecting party.

In this instance, the court determined that the cartoons deliberately sought to exacerbate racial feelings by irrelevant and inflammatory appeals.

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22. *See Carrington*, 76 F.3d at 803.
23. *Id.*
24. *Id.* at 803-04.
25. *Id.* at 804.
26. State Bank of India v. NLRB, 808 F.2d 526, 538 (7th Cir. 1986) (quoting NLRB v. Chicago Marine Containers, Inc., 745 F.2d 493, 496 (7th Cir. 1984)).
27. NLRB v. Eurodrive, Inc. 724 F.2d 556, 558 (6th Cir. 1984) (quoting Sewell Mfg., Inc., 138 N.L.R.B. 66, 71 (1962)).
28. 138 N.L.R.B. 66 (1962).

Although two of the cartoons made a passing reference to legitimate campaign issues, the court said, the imagery used was "quite troubling" and appealed to racial prejudice. While the quote from Dr. King was "'devoid of inflammatory rhetoric or appeals to racial bigotry,'"[29] the court concluded that it was equally devoid of anything related to election campaign issues.

Having found that the Company raised substantial and material issues, the case was remanded to the Regional Director for a hearing on petitioner's objections to the cartoons.

F. *Tel Data Corp. v. NLRB*[30]

This case was a standard Section 8(a)(1), (3) and (5) case involving alleged unilateral changes in terms and conditions of employment as well as claims that employee discharges were motivated by employees' protected, concerted activity.

Tel Data Corporation ("Tel Data" or "the Company") installs electronic communications systems in retail stores. It has had collective bargaining agreements with the Communications Workers of America ("CWA" or "the Union") for several years. In October, 1991 an employee, Dale Frederick, complained that the Company was not complying with the terms of the contract. On November 12, 1991, Tel Data instituted a new procedure regarding employee use of corporate telephone credit cards. Under the new procedure, employees were forbidden from using the cards for personal use, but out-of-town employees could claim an allowance for calls made.

On November 19, 1991, the Company issued another memorandum regarding the use of Company vans by out-of-town employees during off work hours. Under that policy, employees were permitted to "drive company vans a reasonable distance from job sites for meals, shopping for necessities, etc. and, of course, to hotels/motels for lodging purposes."[31]

On December 13, 1991 the Company held a meeting of employees at which the Company's President announced that he knew that at least eight employees had contacted the Union regarding these matters. He added that "'since all this union crap has come up,'"[32] there would be some changes. Employees could not have it both ways, he said, requiring adherence to the contract, while expecting special benefits the Company had been providing beyond the contract requirements. He also threatened to fire all the employees, close Tel Data and reopen the Company under another name.

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29. *Carrington*, 76 F.3d at 807.
30. 90 F.3d 1195 (6th Cir. 1996).
31. *Tel Data*, 90 F.3d at 1196.
32. *Id.* at 1197.

On November 25, 1991, an employee, Sherry Scott, was fired for violating the van policy by using a vehicle for an extended trip without Company approval. Then, three months later, Frederick was terminated for charging personal telephone calls in violation of the telephone credit card policy.

In the subsequent unfair labor practice trial, the ALJ held that the Company violated Sections 8(a)(1) and (5) of the NLRA by unilaterally implementing changes in the credit card policy in retaliation against employees engaging in protected activity. He also determined that the Company violated Sections 8(a)(1) and (3) by discharging Frederick for allegedly violating its unlawfully promulgated policy. Regardimg the van policy, the ALJ held that the Company did not violate the Act because the new policy did not vary materially from its prior unwritten policy. Consequently, the ALJ determined, the discharge of Scott did not violate the Act.

The NLRB upheld the ALJ's decision regarding the credit card policy, but reversed his decision regarding the van policy. The Board held that the new policy did vary from the Company's prior policy, that it was instituted in retaliation and that, consequently, Scott's discharge violated the Act.

On appeal, the Sixth Circuit held that substantial evidence supported the Board's holding as to Frederick. Particularly significant, the court found, was evidence that a supervisor had said about Frederick, "'I can't help him, he's gone to the union, his days are numbered.'"[33] Regarding the van policy and the discharge of Scott, however, the court of appeals reversed the NLRB. Like the ALJ, the court held that the van policy was "essentially a codification of Tel Data's previous position on the issue" and that the discharge was for cause and not in response to protected concerted activity.[34]

G. *Dayton Hudson Department Store Co. v. NLRB*[35]

This case involved the Sixth Circuit's view of the law surrounding campaign misrepresentations. As observers of labor law are all too well aware, the degree to which the Board will regulate campaign misconduct has changed dramatically in recent years, with the Board currently taking essentially a hands-off approach. The Sixth Circuit, on the other hand, has taken a very different, and more exacting, approach to the Board's role in regulating campaign misconduct.

In this case, some employees of one of Hudson's stores sought to be represented by the UAW ("the Union"). In May 1990, an election was held

33. *Id.* at 1198.
34. *Id.* at 1200.
35. 79 F.3d 546 (6th Cir.), *cert. denied*, 117 S. Ct. 73 (1996).

which the UAW won by a margin of 274 to 179. Hudson's, however, lodged objections to the election contending that the election was tainted by a letter sent to employees three days before the election. Among other things, the letter stated that Hudson's had "'claimed profits of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year.'"[36] In fact, however, the total sales for the store for the year in question had totalled $52.5 million and profits had been only $1.4 million.

The NLRB overruled Hudson's objection and held that the letter did not warrant a new election under its standard as set forth in *Midland National Life Insurance Co.*[37] and certified the UAW as the bargaining representative for employees at Hudson's Westland store. Hudson's, however, refused to bargain with the UAW based upon its belief that the Union's certification was inappropriate. The Board then ordered Hudson's to bargain with the UAW.

Two weeks after the order to bargain was entered, however, Hudson's moved to reopen the record alleging that newly discovered evidence revealed that forged authorization cards had been used to generate additional support for the Union. The Board denied Hudson's motion, holding that the allegations, even if true, did not warrant a new election under *Midland Life*.

Hudson's petitioned the Sixth Circuit to review the Board's refusal to reopen the record. The court, in turn, granted the petition and remanded the case to the Board with instructions to conduct a "full inquiry into such questions as how many authorization cards were forged, the actual use to which those cards were put, when these incidents occurred, and whether and in what context any misrepresentations concerning the cards occurred."[38] The court also directed the NLRB to re-evaluate the UAW pre-election letter under its holding in *Van Dorn Plastic Machinery Co. v. NLRB.*[39]

In *Van Dorn*, the Sixth Circuit had parted ways with the NLRB and had indicated a "reluctance to be bound by the *Midland National Life* rule in every case."[40] Instead, the Court wrote:

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36. *Dayton Hudson*, 79 F.3d at 548.

37. 263 N.L.R.B. 127 (1982). In this case the Board held:

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

Midland National, 263 N.L.R.B. at 133.

38. *Dayton Hudson*, 987 F.2d at 367.

39. 736 F. 2d 343 (6th Cir. 1984).

40. *Van Dorn*, 736 at 348.

> There may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.[41]

In this instance, a hearing was held regarding the allegedly forged cards and their effect. The ALJ held that the Company's forgery allegations were a "total fabrication" and that the UAW pre-election letter had not affected the outcome of the election. Consequently, the ALJ reaffirmed the order to bargain. The NLRB again affirmed the ALJ's findings and recommendations.

On appeal again the Sixth Circuit reiterated its view that the NLRA calls for greater scrutiny of campaign misrepresentations than the NLRB envisions. Thus, as in *Van Dorn,* the Court again said that "where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth," an election will be set aside.[42] In this instance, however, the court held that the pre-election letter was not sufficiently deceptive as to warrant the setting aside of the election. Regarding the forgery allegations, the court also sustained the ALJ's decision. While the court disagreed with the ALJ's characterization of the evidence as a "total fabrication", it nevertheless held for the Union on the question of whether the cards influenced the outcome of the election.

While the Sixth Circuit, in the end, affirmed the Board's conclusion that campaign irregularities and misrepresentations were not sufficient to set aside the election, the significance of this case lies in the court's reaffirmation that it will look much more carefully at questions surrounding campaign misrepresentations than the Board. The Court pointedly said, "[w]e stress that we will continue to review cases arising under *Midland National Life* and *Van Dorn* very carefully."[43] Indeed, the Court again revisited the question of the degree of scrutiny to be applied to campaign rhetoric in the next case.

H. *Mitchellace, Inc. v. NLRB*[44]

This matter involved two consolidated cases. Mitchellace, Inc. ("the Company") manufactures shoe products. Following a heated organizational campaign by the Amalgamated Clothing and Textile Workers Union ("the Union"), a representation election was held and the Union was certified as the

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41. *Id.* (citing *Midland National*, 263 N.L.R.B. at 131).
42. *Dayton Hudson*, 79 F.3d at 550 (quoting *Van Dorn*, 736 F.2d at 348).
43. *Id.* at 551.
44. 90 F.3d 1150 (6th Cir. 1996).

employees' bargaining representative. In the first aspect of the case, the Company contended that the election was sullied by Union fliers distributed shortly before the election and that the NLRB wrongly excluded two employees from the bargaining unit. In the second aspect of the case, the Company challenged the Board's determination that it had discriminatorily discharged two employees as a result of their union activity.

With respect to the first aspect of the case, the facts revealed that the Union distributed three fliers within twenty-four hours of the election. The first communication concerned the discharge of an employee, Pennington, whom the Company contended was terminated for destruction of Company property. In this flier, the Union accurately reported that the Board had issued a complaint against the Company alleging that the termination was prompted by Pennington's union activity. It also stated, however, that the Company had been found guilty of discharging employees for union activity and that it would be required to reinstate Pennington and compensate her for pay lost as a result of her termination. In fact, of course, the issuance of the complaint did not constitute a determination of unlawful activity, but instead was the functional equivalent of an indictment.

The Company responded to this communication with one of its own entitled "More Union Lies!!!"[45] This flier accurately stated that the Company had not been found guilty of unlawful conduct. The Union, in turn, issued a second flier entitled "Justice" which stated that the Board had issued a complaint against the Company for discharging Pennington. It also said, however, that the Cincinnati office of the NLRB had found the Company guilty of unlawful activity.

The third flier concerned the status of certain employees provided to the Company by a temporary agency, Kelly Services. These employees had been excluded from the unit by the Regional Director and the NLRB had denied review of that decision. The third flier wrongly stated that the Union "'has reason to believe that the Cincinnati branch office may have made a mistake when they excluded Kelly workers from voting. Therefore, they are investigating this issue further and still have not made a determination either way.'"[46]

Following the election, the Company objected to the fliers. The NLRB analyzed the Union's communications under the Sixth Circuit's *Van Dorn* standard and concluded that the fliers did not contain a misrepresentation "so pervasive and artful as to affect employees' right to a free and fair choice."[47]

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45. *Mitchellace*, 90 F.3d at 1154.
46. *Id.* (emphasis omitted).
47. *Id.* at 1155.

In so doing, the Court specifically rejected the Company's principal objection to the timing of the communications — that they were distributed within twenty-four hours of the election. The court plainly stated, "this court has never held that timing alone is determinative."[48] Rather, the court said, a combination of factors, including whether the employer was aware of the communication and had an opportunity to respond, was pivotal. Here, of course, the Company was fully aware of the fliers and in fact responded with a communication of its own.

Regarding the bargaining unit status of the two employees, the Sixth Circuit affirmed the Board's determination that they were office clericals and did not share a community of interest with the production or maintenance employees. Thus, their exclusion from the unit was proper.

CONCLUSION

As the foregoing recitation indicates, 1996 was largely an unexceptional year in terms of important developments in the area of labor and employment law in the Sixth Circuit. It can be fairly said, however, that the last two cases, *Dayton Hudson* and *Mitchellace* further solidify the Sixth Circuit's disagreement with the NLRB as to the proper scope of governmental involvement in union election campaigns. The NLRB has essentially said it will no longer closely review campaign rhetoric for misrepresentations. The Sixth Circuit, on the other hand, has again indicated its willingness to enter the fray and to set aside elections where misrepresentations made during an election campaign are likely to have substantially mislead the employees. This approach, in turn, will likely lead to greater litigation in the area and uncertainty as to the outcome of union elections in this circuit.

48. *Id.*