No. 00-61

In the Supreme Court of the United States

T.E.G./L.V.I. ENVIRONMENTAL SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a misstatement in a flyer distributed by a union during an election campaign did not warrant setting aside an election result because the flyer was clearly identified as one distributed by the union, did not purport to be an official document of the Board, and was recognizable as campaign propaganda.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1-2) is not yet reported. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 11-23) is reported at 328 N.L.R.B. No. 69. The Board's decision and certification of representative in the representation proceeding (Pet. App. 3-10) is reported at 326 N.L.R.B. No. 160. The hearing officer's report in the representation proceeding (App., *infra*, 1a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2000. Pet. App. 1. A petition for rehearing was denied on April 17, 2000. Pet. App. 24. The petition for a writ of certiorari was filed on July 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a California corporation that provides nonretail environmental cleanup services and fireproofing. Pet. App. 15-16. It is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (Act), 29 U.S.C. 152(6) and (7). Pet. App. 16. The Union[1] is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. 152(5). Pet. App. 16.

On March 5 and 6, 1998, an election was held among an appropriate bargaining unit of petitioner's employees, pursuant to a stipulated election agreement, to determine whether those employees would be represented by the Union. Pet. App. 3, 16. The revised tally of ballots revealed 97 votes in favor of the Union, and 87 against. *Id.* at 3.[2] On March 12, 1998, petitioner filed an objection, alleging that the election should be set aside because the Union had engaged in objectionable conduct by mailing to employees, prior to the election, a

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[1] Collectively, Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers' International Union of North America, AFL-CIO, and International Association of Heat & Frost Insulators & Asbestos Workers Union Local No. 5, AFL-CIO. Pet. App. 16.

[2] Challenges to seven ballots remained outstanding, but the number was insufficient to affect the result. App., *infra*, 4a.

flyer that improperly gave the impression that the Board favored the union. App., *infra,* 3a, 4a.

The matter proceeded to a hearing and, on May 8, 1998, the hearing officer issued a report, recommending that petitioner's objection be overruled and that a certification of representation be issued to the Union. App., *infra*, 1a-14a. The hearing officer found that, some time between February 6 and 11, 1998, the Union mailed to employees in the bargaining unit a flyer, written in Spanish,[3] which contained the following statement, as translated: "The National Labor Relations Board of the United States of America wants the workers of TEG/LVI Environmental Services to have a union." *Id.* at 4a-8a.

The hearing officer recognized that a document containing such a statement giving the impression that the Board favors either party to an election constitutes objectionable conduct if the document appears to be an official Board document (*e.g.*, the document uses letterhead or typeface similar to official Board documents). App., *infra*, 9a-10a. The hearing officer emphasized, however, that a document containing such a statement does not constitute objectionable conduct under Board precedent if the document does not appear to be an official Board document. *Id.* at 10a. Rather, such a document "is merely propaganda which the employees can evaluate themselves." *Ibid.* (citing *SDC Invs.*, 274 N.L.R.B. 556, 557 (1985)).

The hearing officer found that the flyer at issue here "is clearly not an official Board document." App., *infra*, 10a. The flyer did not purport to be an official document from the Board, was not printed in the same

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[3] Most of the employees in the bargaining unit are immigrants from Mexico, El Salvador, and Nicaragua. App., *infra*, 7a.

typeface as any official Board document, looked nothing like a notice of election or ballot or other Board document, and was distributed on plain paper that contained no letterhead, seal, or other logo. *Id.* at 6a, 10a-11a. Also, the Spanish words used in the flyer to denote the Board "are not the same words the Board uses to denote itself in its official Spanish language publications." *Id.* at 11a. The hearing officer found that the flyer purported to be from the "TEG/LVI Environmental worker's organizing committee," not the Board. And the telephone number listed on the flyer was that of the Union. *Ibid.* The hearing officer concluded that, therefore, distribution of the flyer was not objectionable conduct that warranted setting aside the election.[4]

2. On September 30, 1998, the Board adopted the hearing officer's findings and recommendations, overruled petitioner's objection, and certified the Union as the employees' bargaining representative. Pet. App. 3-10. The Board concluded that the Union did not engage in objectionable conduct that warranted setting aside the election because the flyer containing the misrepresentation about the Board "did not purport to be an official Board document, but rather was clearly identified as one distributed by the Union. Thus, the employees would know that the document emanated from a party and was merely propaganda." *Id.* at 4. The

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[4] The hearing officer rejected various other arguments, including petitioner's challenge to the translation of another sentence in the flyer and petitioner's contention that that sentence gave employees "the impression that the Board has summarily decided that the employees will be represented by the Union," and that the election was a "mere formality." App., *infra*, 8a-9a. The hearing officer concluded that that sentence truthfully explained that "[a]n election was set so the employees could decide whether or not they wished to be represented by the Union." *Id.* at 9a.

Board explained that it "has long held that employees are capable of evaluating propaganda for themselves," *ibid.* (citing *SDC Invs., supra*), and that it "will not set aside an election based on the misrepresentation contained in campaign propaganda," *id.* at 4-5 (citing *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982)). The Board emphasized that it treats a party's "misstatements about Board neutrality the same as other misrepresentations" in campaign propaganda. *Id.* at 5 (citing *Affiliated Midwest Hosp. Inc., d/b/a Riveredge Hosp.*, 264 N.L.R.B. 1094 (1982), enforced, 789 F.2d 524 (7th Cir. 1986)).[5]

One member of the Board dissented. Pet. App. 8-10. He concluded that the election should have been set aside because the misrepresentation, by not merely urging a vote for the Union, but by indicating that the Board wants employees to vote for the Union, went "to the heart of the integrity of the process, i.e., the neutrality of the Agency that is conducting the election." *Id.* at 8-9.

3. Following the Board's September 30, 1998, certification of the Union as the employees' bargaining representative, the Union made a request for bargaining, but petitioner refused based on its disagreement with the

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[5] The Board rejected petitioner's attempt to distinguish the instant case because it involves employees who are immigrants, holding that there is "no basis for concluding here that immigrant employees should be considered less capable than other employees of evaluating campaign propaganda for what it is." Pet. App. 4 n.2. The Board explicitly agreed with the hearing officer's rejection of petitioner's argument relating to another sentence in the flyer based on a different translation proffered by petitioner. See note 4, *supra*. Moreover, the Board held that, even accepting petitioner's translation, the statement would not be objectionable. Pet. App. 6 n.3.

Board's decision certifying the Union. Pet. App. 12 n.2, 17. Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 11-12, 18.[6]

The Board granted the General Counsel's motion for summary judgment. Pet. App. 15.[7] The Board concluded that, by refusing to bargain with the Union and by refusing to furnish the Union with requested information, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. *Id.* at 18. The Board ordered petitioner, *inter alia*, to bargain with the Union. *Id.* at 18-23.

4. The court of appeals denied petitioner's petition for review and granted the Board's cross-application for enforcement of its decision and order. Pet. App. 1-2. The court held that, "[o]n the basis of the record before the court in this case," it could not "find unreasonable the Board's finding that [petitioner] violated Section 8(a)(1) and (5) of the [Act] * * * by refusing to bargain

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[6] Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the Act, among which is the right "to bargain collectively through representatives of their own choosing." 29 U.S.C. 157.

[7] The Board rejected petitioner's denial that it refused to bargain, Pet. App. 12-13 n.2, and petitioner's denial that it failed to respond to a request by the Union for relevant and necessary information, *id.* at 14-15. The Board also found that all representation issues raised by petitioner were or could have been litigated in the representation proceeding, and it denied petitioner's request to litigate issues to which petitioner had agreed in the stipulated election agreement. *Id.* at 12-13 & n.3, 16 n.6.

with the union." *Id.* at 2. The court further ruled that, "[e]ven were [the court] to apply the standard urged by [petitioner], *see, e.g., Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984)," the court "could not overturn the Board when the record is devoid of evidence in support of [petitioner's] assertions regarding the adverse effects of the controverted flyer." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Moreover, the court of appeals' decision is fact-bound and embodied in an unpublished judgment which has no precedential value. Review by this Court therefore is not warranted.

1. The National Labor Relations Board has been entrusted by Congress "with a wide degree of discretion in establishing the procedure and 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). In the exercise of that broad discretion, the Board has concluded that it will not set aside an election based on misleading statements by the parties in an election campaign where the statements are recognizable as campaign propaganda. In *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982), the Board explained:

> [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.

Id. at 133 (footnotes omitted).[8] In a subsequent case applying the *Midland* doctrine, the Board explained that it will treat a party's "mischaracterizations of Board actions in the same manner as other misrepresentations," including those which "potentially convey[] the impression that the Board favors one party in the election campaign over the other party, thus impairing the Board's neutrality." *Affiliated Midwest Hosp. Inc., d/b/a Riveredge Hosp.*, 264 N.L.R.B. 1094, 1094-1095 (1982), enforced, 789 F.2d 524 (7th Cir. 1986).

The court of appeals correctly granted enforcement of the Board's order applying the *Midland*/*Riveredge* analytical framework in this case to overrule petitioner's objection and to decline to set aside the election. The flyer at issue is neither a forged document nor an altered official Board document, nor does it purport to be (or bear any resemblance to) an official Board document. The flyer indicates, on its face, that it was created by the Union, listing the telephone number of the Union as the number to call for further information. Moreover, in a manner typical of campaign propaganda, the flyer exhorts employees to vote for the

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[8] In *Midland*, the Board explained that it had "resolved to return to the sound rule announced in *Shopping Kart Food Market, Inc.*, [228 N.L.R.B. 1311 (1977)], and to overrule" *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), and *General Knit of Cal., Inc.*, 239 N.L.R.B. 619 (1978), which had permitted the setting aside of an election based on misrepresentations by parties in a campaign. *Midland*, 263 N.L.R.B. at 129.

Union at prescribed locations and times. Thus, the flyer's misstatement regarding the Board's neutrality was not presented in a manner that precluded employees from recognizing the partisan campaign propaganda for what it was. Accordingly, the Board reasonably concluded that the misrepresentation was not a basis for setting aside the election.

2. Petitioner contends (Pet. 9-14) that the Court's intervention is necessary in this case to resolve a circuit conflict "over whether exceptions to the Board's *Midland* doctrine should be recognized." Pet. 9. Petitioner points to decisions of the Sixth and First Circuits approving exceptions to the *Midland* doctrine. Pet. 10-12 (citing *Van Dorn Plastic Mach. Co.* v. *NLRB*, 736 F.2d 343 (6th Cir. 1984), and *NLRB* v. *New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1st Cir. 1983)).

In *Van Dorn* and *New Columbus Nursing Home, Inc.*, the courts expressed reluctance to be bound by *Midland* in every case, citing possible cases where the misrepresentation is sufficiently material and fraudulent to affect the outcome of the election. *Van Dorn*, 736 F.2d at 348; *New Columbus Nursing Home, Inc.*, 720 F.2d at 729. Accordingly, in *Van Dorn*, the Sixth Circuit fashioned a limited exception to the *Midland* doctrine for "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." 736 F.2d at 348. The Sixth Circuit adhered, however, to the *Midland* Board's view that "it should not set aside an election on the basis of the substance of representation alone, but only on the deceptive manner in which representations are made." *Ibid.* See *NLRB* v. *St. Francis Healthcare Ctr.*, 212 F.3d 945, 964 (6th Cir. 2000) (court "adhere[s]

to the standards articulated" by the Board in *Midland*, subject to "a narrow exception" recognized by court in *Van Dorn*); see also *Trencor, Inc.* v. *NLRB*, 110 F.3d 268, 275-276 (5th Cir. 1997) (citing *Van Dorn*).

The court of appeals' decision in this case does not conflict with *Van Dorn* or the other decisions approving a *Van Dorn*-type exception to the *Midland* doctrine. The court of appeals expressly addressed petitioner's argument under *Van Dorn* and held that, even were the court to apply *Van Dorn*, the court "could not overturn the Board when the record is devoid of evidence in support of [petitioner's] assertions regarding the adverse effects of the controverted flyer." Pet. App. 2. The court of appeals did not express any agreement or disagreement with the *Van Dorn* decision, but made clear that the outcome in this case would be no different regardless of whether the *Midland* standard or the *Van Dorn* exception were applied. Thus, the decision in this case does not present a conflict with other circuit authority warranting this Court's review.[9]

Moreover, to the extent petitioner contends (Pet. 16) that the Court should grant review because the court of appeals misapplied the *Van Dorn* exception, that fact-bound claim does not merit further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, petitioner's contention is based on the erroneous premise (see Pet. 16-17) that, under the court of appeals' ruling, petitioner could have prevailed

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[9] Although petitioner claims (Pet. 12) that decisions of the Second, Eighth, and Ninth Circuits are in direct conflict with the Sixth Circuit's decision in *Van Dorn*, those cases do not address whether a *Van Dorn*-type exception to *Midland* should be recognized. In any event, even if such a conflict exists, there is no occasion for it to be resolved by the Court in this case for the reasons discussed above.

only if it had "paraded a group of Petitioner's employees before the hearing officer and interrogated them as to whether and to what extent the misleading flyer actually affected their vote." Pet. 17. The court of appeals imposed no such requirement. The court's finding (Pet. App. 2) that the record was "devoid of evidence in support of [petitioner's] assertions regarding the adverse effects of the controverted flyer," did not impose a requirement that petitioner establish that employees were actually intimidated or misled, as petitioner claims (Pet. 16-17). Rather, the court merely noted that there was no record evidence at all to support petitioner's claim that the *Van Dorn* exception should be applied here, *i.e.*, that "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." *Van Dorn*, 736 F.2d at 348 (cited at Pet. App. 2).

A determination whether the *Van Dorn* exception applies depends on an assessment of a number of factors, including the timing of the misrepresentation; whether the employer had an opportunity to respond; the nature and extent of the misrepresentation; whether the source of the misrepresentation was identified; and whether there is evidence that employees were affected by the misrepresentation. *NLRB* v. *St. Francis Healthcare Ctr.*, 212 F.3d 945, 964 (6th Cir. 2000). The court of appeals correctly found that the record does not contain evidence of any kind with regard to those factors that supports petitioner's claim.[10]

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[10] The record indicates that the flyer in question was not a topic of any particular moment to the employees during the election

3. Petitioner also contends (Pet. 20) that the court of appeals' ruling merits review under the Court's super-

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campaign. It was one of two different flyers sent by the Union to employees, and the Union official who drafted the flyer never talked with any employees about it. App., *infra*, 7a. Petitioner's suggestion (Pet. 18 n.8) that the flyer caused low voter turnout because it led employees to believe that the Board was conducting the election "as a mere formality so that the workers 'could finally vote for their union,'" lacks support because it is based on petitioner's translation of the second paragraph of the flyer, which was rejected by the Board. See note 4, *supra*; Pet. App. 6 n.3.

Petitioner's contention (Pet. 15 & n.6) that the flyer necessarily had an adverse effect because the employees are immigrant workers from countries with government-sponsored unions who generally have a sixth grade education is likewise inconsistent with findings of the Board. See Pet. App. 4; App., *infra*, 7a (Board adopting hearing officer findings, including that "[m]any, if not most, of the employees are high school graduates; some have attended college"); Pet. App. 4-5 n.2 (Board finding there is "no basis for concluding here that immigrant employees should be considered less capable than other employees of evaluating campaign propaganda for what it is"). Nor is the Board's decision inconsistent with *Columbia Tanning Corp.*, 238 N.L.R.B. 899 (1978) (Pet. 15-16), where the Board set aside an election because a letter on official state stationery endorsing the union was sent to immigrant employees by a state labor commissioner one day prior to the election, thereby "creat[ing] a very real possibility that the employees could have easily confused the commissioner of labor with the Board." 238 N.L.R.B. at 899. No such facts are present here.

Finally, if petitioner had, in fact, believed that the misrepresentation in the Union flyer would adversely affect the election, it had an opportunity to "set the record straight in exactly the same manner and to exactly the same extent as it can respond to any other misrepresentation." *Affiliated Midwest Hosp., d/b/a Riveredge Hosp.*, 264 N.L.R.B. at 1095 n.6. But there is no record evidence that petitioner believed it necessary to advise employees about the Board's neutrality at any point during the approximately three weeks between distribution of the flyer and the election.

visory authority because the court of appeals misapplied the *Midland* standard to the particular facts of this case. In so arguing, petitioner relies on *NLRB* v. *Chicago Marine Containers, Inc.*, 745 F.2d 493 (7th Cir. 1984), and *Renco Electronics, Inc.*, 330 N.L.R.B. No. 52 (Dec. 23, 1999).

In *Chicago Marine*, the court ultimately concluded that, under *Midland*, the Board reasonably overruled the employer's election objections, for "[n]one of the allegedly objectionable statements involved the use of forged documents or altered Board documents." 745 F.2d at 500. The same is true here. And in *Renco*, the Board set aside an election where a remark made by a Board agent (an interpreter) to an employee waiting in line to vote could reasonably have led employees who overheard the remark to conclude that "the Board favored a 'yes' vote." 330 N.L.R.B. No. 52, slip op. 1. There is no such involvement of a Board agent here. See also Pet. App. 2 (court below distinguishing recent D.C. Circuit decision involving "alleged misconduct [that] was attributable to the Board's agent").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2000

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Region 21

Case 21-RC-19889

TEG/LVI ENVIRONMENTAL SERVICES, INC., EMPLOYER
AND
LABORERS INTERNATIONAL ASBESTOS AND TOXIC ABATEMENT LOCAL UNION 882, LABORERS INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO; AND
INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS UNION, LOCAL NO. 5, AFL-CIO, PETITIONER

Before: John Kloosterman, Hearing Officer

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

Pursuant to a Stipulated Election Agreement approved on February 9, 1998,[1] an election by secret ballot was conducted on March 5 and 6 in a unit of all full-time and regular part-time truck drivers, fire proofers, working foremen, maintenance mechanics, demolition and environmental employees employed by

[1] All dates hereafter are 1998 unless otherwise stated.

TEG/LVI Environmental Services, Inc. ("TEG/LVI") and all employees of LVI Environmental Services, Inc. ("LVI" and jointly as "the Employer") during the referenced payroll period employed in these categories [sic], and including but not limited to workers involved in site mobilization, initial site cleanup, site preparation, removal of asbestos-containing material and toxic waste employed by the Employer in the 12 counties of Southern California (Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern, San Diego and including Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, Santa Barbara Island, San Clemente Island, Santa Rosa Island, Anacapa Island and the Channel Islands Monument); excluding estimators, operations managers, inventory and control employees, sales employees, project engineers, contracts administrators, health and safety officers, professional employees, office clerical employees, guards and supervisors as defined in the Act.

The original tally of ballots served on the parties at the conclusion of the election showed that, of approximately 358 eligible voters, 94 cast ballots for, and 79 against, the Petitioner ("the Union"). There was one void ballot and 58 challenged ballots, which were sufficient in number to affect the election results. During the hearing held for the purpose of resolving the challenged ballots and the Employer's objection, the parties stipulated that 40 of the challenged ballots were from ineligible voters and that another 11 of the challenged ballots were cast by eligible voters. Accordingly, the Parties agreed that the 11 challenged ballots should be opened and counted. Subsequently, a revised tally of ballots was completed and served on the

parties which showed that, of approximately 358 eligible voters, 97 cast ballots for, and 87 against, the Union. One void and seven challenged ballots remained, an insufficient number to affect the election results.

On March 12, the Employer timely filed one objection to conduct affecting the result of the election, a copy of which was served on the Union. The Regional Director investigated the objection and, on March 31, issued and served upon the parties her Report on Challenged Ballots and Objection and Order Directing Hearing, in which she concluded that the issues raised by the challenged ballots and the objection could best be resolved after a hearing. Pursuant thereto, a hearing on the challenged ballots and the Petitioner's objection was held in Los Angeles, California, on April 14 and 15. All parties were given a full opportunity to be heard, to examine and cross-examine witnesses, to present evidence pertinent to the issues, and to make a statement at the conclusion of the hearing.

Upon the entire record of the hearing and my observation of the witnesses, their demeanor and testimony, I make the following findings of fact, conclusions, and recommendations:

THE CHALLENGED BALLOTS

During the election, 58 voters cast challenged ballots. During the course of the hearing, the parties stipulated that 40 of those voters were ineligible. The parties also stipulated that 11 of the ballots were cast by eligible voters. The eligibility of the remaining seven voters

was litigated during the hearing.[2] At the end of the hearing, but before the hearing formally closed, the parties entered into a written stipulation regarding the above-referenced 40 ineligible and 11 eligible voters; the 11 votes were then opened and counted. Subsequently, a revised tally issued which showed 97 votes cast for, and 87 cast against, the Union—a difference of 10 votes. The seven remaining challenged ballots are thus not determinative. Long standing precedent holds that where a conclusive election may result from opening and counting a group of challenged ballots, the remaining challenged ballots need not be resolved. *Glenn L. Martin Co.*, 76 NLRB 755, 757 (1948); *J.I. Case Co.*, 85 NLRB 576, 577 (1949). *See also, NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 327 n.3 (1946). Accordingly, I decline to pass upon the merits of the remaining seven challenged ballots.

THE OBJECTION

Objection No. 1

> On or about February 23, 1998, the Petitioners sent a document in Spanish entitled urgent notice to the employees of the Employer, which stated in relevant part that "The National Labor Relations Board of the United States of America wants the employees of TEG/LVI Environmental Services, Inc. to have a Union."

The objection is based on a Spanish language flyer the Union mailed to TEG/LVI employees prior to the election. The flyer reads as follows:

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[2] The Employer sought to include six of the remaining voters; the Union sought to exclude those six but include another voter.

NOTICIA URGENTE

El Concejo Nacional de Relaciones Laboral de Los Estados Unidos de América quiere que los trabajadores de TEG/LVI Environmental Services, Inc. tengan Unión.

El Consejo Nacional de Relaciones Laborales de Los Estados Unidos de América ordeno que se llevara acabo una elección entre todos los trabajadores de TEG/LVI Environmental Services, Inc., para que finalmente puedan decidirse a votar por su Unión, las elecciones serán de la siguiente manera.

Para los trabajadores o los que reciden en la area de San Diego la elección se llevara acabo el 5 de Marzo 1998 en la oficina de la Junta Nacional de Relaciones Laborales:

Dirección:	555 W. Beech Street, Suite 302 San Diego, CA 92101
Hora:	2:30 p.m. - 5:30 p.m.

Para los trabajadores que trabajan o reciden en la area de Los Angeles o ciudades vecinas, la elección se llevara acabo el 6 de Marzo 1998. En la propiedad de la compania TEG/LVI Environmental Service, Inc. posiblemente en la warehouse o en el salón de entrenamiento:

Dirección:	4710 South Eastern Avenue Los Angeles, CA
Hora:	12:00 p.m. to 7:00 p.m.

Las elecciones son secretas y serán supervisadas por el Gobiemo Federal de Los Estados Unidos.

Tu futuro y el de tu familia esta en tus manos.
DECÍDETE Y VOTA UNIÓN SI!!!!!

Sinceramente,

Comite organizador trabajadores de
TEG/LVI Enivornmental Inc. [sic]
Informacion - (310)768-0558

The flyer is printed on plain paper containing no letterhead. It does not contain a seal or any other type of logo. It is not printed in the same typeface as a Notice of Election, an Official Ballot, or any other official Board document.[3] The flyer purports to be from "the TEG/LVI Environmental Inc. worker's organizing committee." The phone number listed on the flyer is that of Laborers' Local 882.

The author of the flyer is not at issue. At the hearing, Local 882 Business Manager Homberto Garcia readily admitted that he drafted the flyer on February 5 or 6. Garcia also testified that he directed another Union member, Rafael Orellana, to mail the flyer between February 6 and 11—prior to the Union receiving a copy of the Excelsior list.[4] Garcia also testified,

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[3] I hereby take administrative notice of both the English and Spanish language versions of the Notice of Election, the Official Ballot, and the Board's various brochures. I also take administrative notice of the Board's seal and letterhead.

[4] Gomez's recollection of the exact date was sketchy; he later testified that the flyer was likely mailed on either Saturday, February 7 or Monday, February 9. However, while testifying, Gomez always averred that the flyer was mailed after the stipulated election agreement was signed by both parties on February 5, but before he received the Excelsior list. While the Employer alleges that the flyer was mailed much later in February, it

without contradiction, that the flyer was the second flyer the Union sent to the Employer's employees and that he never talked with any of the employees about the flyer. The employees in question, the flyer's audience, are mostly immigrants from Mexico, El Salvador, and Nicaragua. Many, if not most, of the employees are high school graduates; some have attended college.[5]

The exact translation of the flyer is in question. The Employer provided an English translation of the flyer with its Objections. However, the Union disputes parts of the Employer's translation. Since I have limited Spanish language skills, I asked Field Examiner Penny Castellanos, a native of Guadalajara, Mexico who also has a bachelors degree in Spanish, to translate the flyer. Field Examiner Castellanos did not take part in any aspect of the instant case and has no knowledge of

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produced no evidence to support its claim. Accordingly, I find that the flyer was mailed sometime between February 6 and February 11. However, either way, the flyer was produced and mailed during the critical period.

[5] Employer witness Porfirio Medino testified that the average employee had a 6th Grade education. Mr. Medino based his testimony on the fact that he hired most of the employees. No employees were called to testify. However, in the course of providing evidence regarding the challenged employees, the employer introduced 15 employment applications into evidence. The Union introduced one employment application into evidence This representative sampling of the Employer's employees shows that nine of the 16 employees claim to be high school graduates. Two of the employees list some college attendance; two other employees aver that they attended high school but did not graduate. Accordingly, I do not credit Medina's testimony on this point. Instead, I rely on the documentary evidence before me and find that the average TEG/LVI employee has a high school education.

the case's facts. She translated the flyer without knowing that the flyer is the subject of a post-election objection. I hereby take administrative notice of Field Examiner Castellanos' translation of the flyer.

The salient portions of the flyer are the first two paragraphs, each of which begins "El Consejo. . ." The parties and Field Examiner Castellanos agree on the translation of the first paragraph: "The National Labor Relations Board of the United States of America wants the workers of TEG/LVI Environmental Services to have a union." I will return shortly to a discussion of the first paragraph.

The parties differ on their translations of the second paragraph. The Employer translates this paragraph as follows: "The National Labor Relations Board of the United States of America ordered that an election should take place between the workers of TEG/LVI Environmental Services, Inc., so that they can finally vote for their union . . ." In contrast, Union witness Gomez, the flyer's author, translates the second paragraph differently: "The National Labor Relations Board of the United States of America ordered that an election should take place for all employees of TEG/LVI Environmental Services so you can decide to vote for a union . . ." The difference is that the Union's version tells employees that "**you can decide** to vote for **a** union" (emphasis added). In contrast, the Employer's version tells employees that "**they** can vote for **their** union" (emphasis added). The Employer apparently argues that the difference is crucial because "they" and "their" when read together with the first paragraph gives employees the impression that the Board has summarily decided that the employees will be

represented by the Union; the election is a mere formality. The Union argues that the Employer misreads the words "decidirse," which in this context means, "to decide for themselves," and "su" which allegedly means "a."

Field Examiner Castellanos' translation is closer in substance to the Union's translation than the Employer's. Her translation reads: "The National Labor Relations Board of the United States of America ordered that an election will take place between all of the workers at TEG/LVI Environmental Services, so that you can finally decide for yourselves to vote for your union . . ." Field Examiner Castellanos concurs that "deciderse," used in this context, means that the Union is urging the employees to decide for themselves. However, Field Examiner Castellanos concurs with the Employer that "su" can never mean "a." I adopt Field Examiner Castellanos' non-partisan translation and find that the second paragraph merely states the truth: An election was set so the employees could decide whether or not they wished to be represented by the Union. Since the paragraph clearly states that the employees are themselves making this choice, the paragraph cannot be read in the way the Employer argues. Further, the fact that, technically, the Board did not order an election—the parties stipulated to an election—is a minor misstatement that does not somehow give an official Board imprimatur to the Union. Used in the context of deciding for themselves, I also find no material difference between "a union" and "your union."

The flyer's first paragraph is somewhat different. It clearly states that the "The National Labor Relations

Board of the United States of America wants the workers of TEG/LVI Environmental Services to have a union." As a general rule, it is objectionable conduct to give the impression that the Board supports either party to an election. *Monmouth Medical Center*, 234 NLRB 328 (1979); *GAF Corp.*, 324 NLRB 1209 (1978). The cases analyzing what types of documents constitute objectionable conduct fall into two general categories: those involving documents which appear to be official documents; and those involving documents which do not appear to be official.

When documents appear to be official, e.g., an altered ballot or election notice which gives the impression that the Board prefers one party to the other, the document is generally objectionable. *Allied Electric Products, Inc.*, 109 NLRB 1270 (1954). The document is also objectionable if it uses letterhead similar to the Board's or the same typeface the Board uses. *GAF Corp.*, *supra*. If the document in question clearly identifies the party responsible for its preparation and does not purport to be an official document, the document, while verging on unethical, does not constitute objectionable conduct. *SDC Investments*, 274 NLRB 556, 557 (1985); *Crown Cork & Seal v. NLRB*, 659 F.2d 127 (10th Cir. 1981). Rather, the document is merely propaganda which the employees can evaluate themselves. *SDC Investments, supra*.

The flyer at issue is clearly not an official Board document. The flyer looks nothing like a ballot, a Notice of Election, or any other Board document.[6] The flyer does not contain an official Board seal, or a seal or logo

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[6] See Footnote 3, *infra*.

of any type. The flyer is not set in the same typeface as that used by the Board. The words used in the flyer to denote the Board, "El Concejo Nacional de Relaciones Laboral," are not the same words the Board uses to denote itself in its official Spanish language publications—La Junta Nacional de Relaciones del Trabajo. Finally, the flyer clearly purports to be distributed by the TEG/LVI Environmental worker's organizing committee, not the Board, and lists the Union's telephone number, not that of the Board. On this basis, the flyer is not objectionable.

The Employer argues that the flyer is nevertheless objectionable under *Columbia Tanning Corp.*, 238 NLRB 899 (1978). In *Columbia Tanning*, the Board overturned an election based on a letter sent to employees by the Massachusetts Labor Commissioner, a Mr. Roussos. The letter, written in Greek and sent on official stationary bearing the Massachusetts seal, was sent to 26 Greek speaking employees 24 hours before the election. In the letter, the Commissioner, a man of Greek heritage and a former member of the union petitioning for the election, urged the Greek employees to vote for the union. The union ultimately won the election by 10 votes.

In overturning the election based on the objectionable letter, the Board noted that the Greek employees who were the recipients of the letter were recent immigrants, 50% of whom spoke no English. The Board also noted that Mr. Roussos, by virtue of his position, had "a significant degree of control over the terms and conditions of employment in Massachusetts, particularly over alien workers." 238 NLRB at 900 n.4. Further, the Board noted that recent immigrants were

likely not familiar enough with "the complexities of state and Federal jurisdiction over labor relations" to be able to discern the difference between the state Labor Commission and the National Labor Relations Board. *Id.* at 900.

The instant case is factually dissimilar to *Columbia Tanning*. *Columbia Tanning* is, at its core, a case involving an official imprimatur on one of the parties to the election, the only distinction being that the official imprimatur was that of the Massachusetts Labor Commissioner rather than that of the Board. Thus, the Board merely extended its general rule to include the Massachusetts Labor Commissioner because it found the employees who received the document were unsophisticated about the interaction of state and Federal labor agencies and could not readily discern the difference between the two. In sum, the employees received an official letter from a government labor official who held some power over their working conditions; the fact that the letter was from a state labor official rather than a Federal official was inconsequential because of the possibility of a misunderstanding. *See also, Ursery Companies, Inc.*, 311 NLRB 399 (1993) (a Board majority refused to apply *Columbia Tanning* to a letter in support of the union written by a Connecticut State Representative).

In contrast, the instant flyer is clearly distributed by the Union. It does not purport to be written by a local, state, or Federal official. It is not on official stationary. Even assuming arguendo that the Employer's workforce is made up solely of Spanish speaking recent immigrants with little education, as the Employer alleges, my conclusion would not change. The back-

ground of the Greek employees in *Columbia Tanning* was important solely to show that they could confuse an official letter written by a state labor official with an official Board imprimatur. Those facts are not present here. Further, unlike the *Columbia Tanning* employees, the TEG/LVI employees had much longer than 24 hours to evaluate the flyer. Once again, even assuming arguendo that the flyer was not mailed until February 23, as the Employer alleges, the employees would still have had more than a week in order to evaluate the flyer. Thus, *Columbia Tanning* is readily distinguishable from the instant case.

The case which seems more applicable here is an oldie but a goodie: *Corn Products*, 58 NLRB 1441 (1944). *Corn Products* involved an election between two competing unions at the height of World War II. One union was a CIO affiliate, the other an employee association started by the employees. The CIO affiliate distributed flyers stating that the NLRB and the NWLB (the National War Labor Board) officially disfavored the employee association. The Board found the flyer to be "highly offensive and unethical." 58 NLRB at 1443. However, the flyer was unobjectionable because it did not purport to be an official Board statement and was clearly "signed, issued, and circulated by one of the competing unions." *Id.* at 1442 fn.5. In other words, the flyer clearly identified the responsible party and was clearly not an official document. *See, SDC Investments, supra.* I find *Corn Products* utterly applicable to the instant case; the instant flyer is offensive and unethical but does not purport to be official and was clearly signed and circulated by the Union. Therefore, I find no merit to this objection.

Recommendation

The undersigned, having made the above findings and conclusions, viewing the alleged conduct both individually and cumulatively, and upon the record as a whole, recommends that Objection No. 1 be overruled. Accordingly, I recommend that a Certification of Representative be issued to the Petitioner.[7]

Dated at Los Angeles, California, this 8th day of May, 1998.

/s/ JOHN KLOOSTERMAN
JOHN KLOOSTERMAN
Hearing Officer

[7] Under the provisions of Section 102.69 of the Board's Rules & Regulations, Series 8, as amended, exceptions to this report may be filed with the Board in Washington D.C. 20570. Exceptions must be received by the Board in Washington by May 22, 1998.