

**Kalin Construction Company, Inc. and Local 324, A, B, C, & D, International Union of Operating Engineers, AFL-CIO.** Cases 7-CA-35201 and 7-RC-20175

July 8, 1996

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS  
BROWNING, COHEN, AND FOX

The major issue this case presents is whether the Respondent engaged in objectionable conduct by distributing altered paychecks to its employees as they approached the polls to vote in a Board election. Applying a totality-of-circumstances approach, Administrative Law Judge Karl H. Buschmann sustained the Union's objection and set the election aside. We agree with the result the judge reached, but not his reasoning. For the reasons set forth below, we have decided to adopt a new rule, similar to the one set forth in *Peerless Plywood Co.*, 107 NLRB 427 (1953), prohibiting the kind of eleventh-hour campaign tactics employed here by the Respondent.<sup>1</sup>

I. FACTUAL BACKGROUND

The underlying facts are not in dispute. On Friday, May 13, 1994, between the hours of 4 and 6 p.m., an election was conducted among the Respondent's equipment operators and mechanics at the Respondent's facility located in Sodus, Michigan. The Board agent in charge of the election originally selected as the polling area an office with an exterior door (office A) through which voters could gain easy access to the polls.<sup>2</sup> Shortly thereafter, the Respondent's attorney advised the Board agent that office A was inappropriate and that the voting area should be moved to an inner office (office B). The Board agent and the union representative acquiesced in the Respondent's request to change the polling area.

As the voting began, employees could reach the polls by entering through an overhead garage door and proceeding into the garage area, which provided access to office B. Shortly after 4 p.m., however, the Board agent noticed that a truck had been parked in the garage and that the overhead doors had been closed. As a result, voters could gain access to the polling area only by first entering through the exterior door to Office A, walking through office A to the garage area, and then proceeding to office B.

<sup>1</sup>On December 23, 1994, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief.

<sup>2</sup>On the day of the election, virtually all employees were working off premises at various construction sites and had to return to the Company's facility at the end of their shift in order to cast their ballots.

As employees entered office A on their way to the polls, they encountered company secretary Edith Leva, who handed them their pay envelopes. Although employees were typically paid on Fridays, employees had never before received their paychecks from the company secretary at the Respondent's facility. Instead, employees usually received their paychecks from construction foremen at the jobsite when they completed their shift. Further, the Respondent's past practice was to issue each employee one paycheck per pay period. On this occasion, however, each employee received two checks totaling the amount due.

Accompanying the two paychecks were the following notices:

Due to the current Organizing Drive the Operating Engineers Union is conducting, we feel obligated to inform you of the effects of joining such an Organization. Examine your Check carefully, for this is ALL you will receive each week UNDER UNION REPRESENTATION. Now open the other envelope . . . .

This is the amount of your benefits that we pay you in cash each week as part of your pay. We have always thought that most Employees knew what to do with their OWN MONEY. Under Union rules, we will send this Money to **THEM**, for which they will **CHARGE YOU MORE MONEY TO HANDLE!**

If you have any questions, please contact Cheryl or Jerry. Our doors are always open.

Leva testified that as she distributed the paychecks, she advised each employee to "take time to look at it and understand it." Leva was stationed inside office A throughout the election period.

According to the Board agent's testimony, he typically designates an area 30 to 40 feet from the voting booth as the polling area, and he keeps it free from interested parties and electioneering. In this case, Leva was 30 to 35 feet from the voting booth, "on the edge" of the designated polling area. Apart from the activity of Leva, no other campaigning occurred in or around the polling area. The Union lost the election and filed seven objections, four of which were subsequently withdrawn.<sup>3</sup> Thereafter, the remaining three objections were consolidated for hearing with a related unfair labor practice case.

II. THE JUDGE'S DECISION

Following the consolidated hearing, the judge found merit in one of the complaint allegations of unlawful

<sup>3</sup>The tally of ballots shows 5 for and 24 against the Union, with 1 challenged ballot, an insufficient number to affect the results.

conduct and in two of the Union's objections.<sup>4</sup> Accordingly, the judge set the election aside and ordered that a second election be directed.

Specifically, the judge found that the Respondent violated Section 8(a)(1) when a company agent threatened an employee with a loss of insurance benefits if the Union prevailed in the election. The judge also sustained the Union's parallel election objection (Objection 1), which alleges that the Respondent threatened loss of employee benefits.

Finally, addressing what he termed "a more difficult issue," the judge sustained Objection 7, which alleges that the Respondent campaigned in the polling area. In support of his conclusion, the judge relied on the following factors: the Respondent's campaigning took place during the election in an area that was both off limits to the Union and adjacent to the actual polling area; the Respondent's message concerning union dues deductions, which was underscored by the split paycheck technique, incorrectly represented that employees had no choice in negotiating a contract with a union-security clause; the Respondent deviated from its past practice of paying employees at the jobsite; and the Respondent was afforded the opportunity to check off employees who had voted.

### III. THE RESPONDENT'S EXCEPTIONS

The Respondent has excepted to all adverse findings. With respect to the loss-of-benefit unfair labor practice allegation, the Respondent argues that its statement constituted a permissible prediction, not an unlawful threat. Therefore, the Respondent claims that no basis exists for Union Objection 1 and that it should be overruled.

With respect to Objection 7, the Respondent contends that the judge misapplied recent Board precedent declining to set aside elections based on similar employer conduct.<sup>5</sup> In addition, the Respondent argues that the paycheck distribution did not occur within a no-electioneering area, that the message in the pay envelopes was not misleading, and that there is no record evidence that a list of voters was kept.

### IV. DISCUSSION

We agree with the judge, for the reasons he stated, that the Respondent violated Section 8(a)(1) of the Act

<sup>4</sup>The judge dismissed the complaint allegation that the Respondent threatened employees that the organizing effort would be futile. The judge also overruled Objection 6, which alleges that the polling area was changed without the Union's knowledge. No exceptions were filed to these aspects of the judge's decision.

<sup>5</sup>See, e.g., *Offshore Shipbuilding*, 274 NLRB 539 (1985); *Patchett's Bus Transportation Co.*, 253 NLRB 996 (1981); *Moody Nursing Home*, 251 NLRB 147 (1980); and *William Carter Co.*, 208 NLRB 1 (1973).

by threatening employees with loss of benefits.<sup>6</sup> We find it unnecessary to decide whether this conduct warrants setting aside the election, however, because we agree with the judge that Objection 7 should be sustained.

This is not the first opportunity we have had to address whether it is objectionable for an employer to issue employees "dual" or "split" paychecks and to change its method and location for distributing them, all for the purpose of influencing the outcome of a Board election. Over the past several decades, the Board has been presented repeatedly with cases raising this issue. In these cases, the Board has analyzed all the surrounding circumstances, e.g., the timing and location of the paycheck distribution; whether the paycheck distribution constituted a departure from the employer's past practice; whether the paycheck distribution was made in an intimidating manner; the identity of the person distributing the paychecks or returning any withheld money to employees; the length of time employees were separated from their money; and the nature and accuracy of the message disseminated with the paychecks.<sup>7</sup> Current precedent in this area presents decidedly mixed results and depends in large part on the factual scenario presented in each case.<sup>8</sup>

For the reasons set forth below, we have decided to abandon this case-by-case approach and adopt instead a strict rule against changes in the paycheck process, for the purpose of influencing the employees' vote in the election, during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.

<sup>6</sup>We shall modify the judge's narrow injunctive language to conform it to that traditionally used by the Board in Orders issued against employers.

<sup>7</sup>We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

<sup>8</sup>In any particular case, the Board's willingness to undertake an analysis of the accuracy of the message accompanying the paycheck has depended in large part on the state of the law on campaign misrepresentations. Of course, in light of *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), cases setting aside elections on the basis of misrepresentations are no longer valid.

<sup>8</sup>For cases in which election interference was found, see *Peachtree City Warehouse*, 158 NLRB 1031 (1966); *Crown Laundry & Dry Cleaners*, 160 NLRB 746 (1966); *Yazoo Valley Electric Power Assn.*, 163 NLRB 777 (1967), *enfd.* in part 405 F.2d 479 (5th Cir. 1968); *Justus Co.*, 199 NLRB 422 (1972); and *Aldon, Inc.*, 201 NLRB 579 (1973).

For cases in which no election interference was found, see *Montrose Hangar Co.*, 120 NLRB 88 (1958); *Geyer Mfg.*, 120 NLRB 208 (1958); *Mosler Safe Co.*, 129 NLRB 747 (1960); *Caressa, Inc.*, 158 NLRB 1745 (1966); *Fasco Industries*, 173 NLRB 522 (1968), *enfd.* 412 F.2d 589 (4th Cir. 1969); *TRW, Inc.*, 173 NLRB 1425 (1968); *Tunica Mfg. Co.*, 182 NLRB 729 (1970); *William Carter Co.*, *supra*; *Coco Palms Resort Hotel*, 208 NLRB 966 (1974); *Moody Nursing Home*, *supra*; *Patchett's Bus Transportation Co.*, *supra*; and *Offshore Shipbuilding*, *supra*.

### A. Legal Framework

It is well established that “Congress has entrusted the Board 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, 330–331 (1946). Over the past 60 years, the Board has exercised that discretion on numerous occasions to develop rules and policies governing the conduct of representation elections. At all times, the Board’s paramount concern has been, and still is, assuring employees full and complete freedom of choice in selecting a bargaining representative. As the Board stated in *General Shoe Corp.*, 77 NLRB 124, 127 (1948), a leading case in this area:

In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

An important Board rule implementing the laboratory conditions standard is the one set forth in *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953), prohibiting employers and unions “from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election.” The Board stated that such last-minute, captive-audience speeches “have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect.” The Board reasoned as follows:

We believe that the real vice is in the last-minute character of the speech coupled with the fact that it is made on company time whether delivered by the employer or the union or both. Such a speech . . . gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word.

The Board further stated in *Peerless Plywood* that it would set aside elections for violations of this rule whenever valid objections are filed.

In subsequent cases, the Board has applied this rule “with vigilance.” *Industrial Acoustics Co. v. NLRB*, 912 F.2d 717, 720 (4th Cir. 1990). See, e.g., *United States Gypsum Co.*, 115 NLRB 734, 735 (1956) (election set aside when union sound truck broadcast reached employees as they worked, although employees were not gathered in a traditional “massed assem-

bly”); *Montgomery Ward & Co.*, 124 NLRB 343, 344 (1959) (*Peerless Plywood* ban not limited to a “formal speech in the usual sense”); and *Honeywell, Inc.*, 162 NLRB 323, 325–326 (1966) (“strict adherence” to *Peerless Plywood* rule is desirable to promote fair elections).

The *Peerless Plywood* rule has received acceptance in the courts of appeal. For example, in *NLRB v. DIT-MCO*, 428 F.2d 775, 777–778 (8th Cir. 1970), the Eighth Circuit concluded that the Board properly set an election aside on the basis of the employer’s breach of the *Peerless Plywood* rule. Although the employer argued that the speech in question did not affect employee free choice in the election, the court held that *Peerless Plywood* “announces an irrebuttable rule of policy” and that the employer’s argument was therefore “legally irrelevant.”

Similarly, in *NLRB v. Excelsior Laundry Co.*, 459 F.2d 1013 (10th Cir. 1972), the Tenth Circuit upheld the Board’s decision to set aside an election on the basis of a *Peerless Plywood* violation. The court commented approvingly on the rule, as follows:

The rule was enacted to prevent last-minute speeches from having an unsettling effect and interfering with a free election. Such tactic is an unfair advantage to the party having the last word and makes no difference whether the remarks have a coercive effect or not if addressed to employees gathered on company time. [459 F.2d at 1014.]

In 1968, the Board promulgated another election rule implementing the *General Shoe* laboratory conditions standard. In *Milchem, Inc.*, 170 NLRB 362 (1968), the Board established a “strict rule” against “prolonged conversations between representatives of any party to the election and voters waiting to cast ballots.” The Board sought to guard against “the potential for distraction, last minute electioneering or pressure, and unfair advantage.” *Id.* The Board emphasized that the “final minutes before an employee casts his vote should be his own, as free from interference as possible.” *Id.*

Implicit in the *Peerless Plywood* and *Milchem* rules is the Board’s judgment that conduct that is otherwise unobjectionable can disturb laboratory conditions if it occurs during, or immediately before, the election. That judgment has withstood the test of time and is one with which we wholeheartedly agree.<sup>9</sup>

<sup>9</sup>Member Cohen’s dissent condemns our reliance on the rules established in the *Peerless Plywood* and *Milchem* cases because the facts presented in this case do not “fit” with those cases, i.e., we are not presented here with a “captive audience” speech nor are we dealing with “prolonged conversations” at the polls. We rely on these cases, however, not to make a literal application of a precedential rule. Rather, we borrow from those cases the broader

It is our considered view, based on our cumulative experience in conducting numerous elections over many years, that like last-minute campaign speeches on company time and last-minute electioneering, last-minute changes in the paycheck process have an unsettling effect on employees and disturb the laboratory conditions necessary for a fair election. An employee's paycheck cannot be equated to an ordinary piece of campaign literature exempt from the *Peerless Plywood* rule. An employee's paycheck is a singular document. It not only compensates employees for their past efforts on their employer's behalf, but also it is the means by which employees provide life's necessities for themselves and their families. At the same time, the paycheck is a visible symbol of what the Supreme Court has termed "the economic dependence of the employees on their employer." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

Unlike campaign literature, which is often ignored and discarded, paychecks are scrutinized and safeguarded. Changes in the form of the paycheck or in the manner of its distribution are likely to be the subject of intense interest. Therefore, when an employer changes its paycheck process for the purpose of expressing its antiunion views, the employer is in effect addressing a "captive audience," just as if the employer had assembled employees on company time to hear an election speech. When such a change occurs during or immediately before a Board election, we believe that the employer has used a tactic peculiarly within its control to gain an unfair advantage and obtain the last word.

#### B. *Statement of the Rule*

Simply stated, our rule prohibits changes in the paycheck process, for the purpose of influencing the employees' vote in the election, during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls. The term "paycheck process" encompasses the following four elements:

1. The paycheck itself.
2. The time of paycheck distribution.
3. The location of paycheck distribution.
4. The method of paycheck distribution.

If there is a change in any one of these four elements during the proscribed period, we will set aside the election upon the filing of valid objections, absent a

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notion that certain kinds of last-minute pressure to persuade, whether committed by unions or employers, are disruptive of the election process, and should be curtailed in order to encourage employee free choice.

showing that the change was motivated by a legitimate business reason unrelated to the election.<sup>10</sup>

We wish to stress the limits of this rule. The rule will not interfere in any way with the circulation of campaign literature at any time prior to an election. Nor does the rule prohibit the use of any other legitimate campaign propaganda. Indeed, the rule does not even prohibit changes in the paycheck process for campaign purposes prior to the proscribed period. Thus, under this rule, an employer will still have numerous alternative means of communicating its views on the costs of union membership without resorting to changes in the paycheck process on the very eve of a Board election.

Even within the proscribed period, if a change in the paycheck process is motivated by a legitimate business reason unrelated to the election, the rule would not be violated.<sup>11</sup> In sum, the rule merely prohibits campaign-motivated changes in the paycheck process during and immediately before a Board election.

In his dissent, Member Cohen suggests that the rule we adopt today transgresses an employer's free speech rights by curtailing the employer's use of "graphic speech" to impart an election message to its employees. We respectfully disagree. As the dissent concedes, Congress limited the "free speech" protection of Section 8(c) "to the adversary proceedings involved in unfair labor practice cases and it has no application to representation cases." *Dal-Tex Optical*, 137 NLRB 1782, 1787 fn. 11 (1962), citing *General Shoe Corp.*, supra. Furthermore, as discussed above, under the new rule, the employer remains free to convey to its employees that union representation is not free from monetary costs. Indeed, the employer may even employ the use of dual or split paychecks without engaging in objectionable conduct at any time during the critical period *except the 24 hours immediately preceding the election and throughout the duration of the polling itself*. This limited rule is fully consistent with our statutory authority to protect and ensure the laboratory conditions of representation elections. See, e.g., *A. J. Tower*, 329 U.S. at 330-331. There is nothing in Sec-

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<sup>10</sup>We overrule prior cases that are inconsistent with the rule we announce today.

<sup>11</sup>It is well established that the burden is on the objecting party to supply evidence that prima facie would warrant setting the election aside. *Buflor-Pelzner Division*, 169 NLRB 998, 999 (1968). Therefore, we will place the burden on the union to show that a change in the paycheck process occurred within the proscribed period. If that burden is satisfied, and if the employer fails to establish a legitimate business reason for the timing of the change, we will draw an inference that the employer's motive was to influence the employees' vote in the election. We do not agree with the dissent's contention that we have misplaced the burden of proof. See *Stanton Industries*, 313 NLRB 838 fn. 2 (1994) (employer established legitimate reason for timing of change in system for distribution of paychecks that was unrelated to the exercise of Section 7 rights or to the election).

tion 8(c) to preclude setting an election aside on the basis of a party's eleventh-hour campaign tactic that has substantially impaired employee free choice.

Nor is there any substance to the dissent's claim that our decision "flies in the face of precedent." As discussed above and in footnote 8, *supra*, precedent in this area is decidedly "two-faced": certain cases have found the use of split paychecks to be permissible, while others have found the technique to be objectionable. An example of the latter is *Aldon, Inc.*, *supra*, where, on facts similar to those presented here, the Board adopted the administrative law judge's finding that the respondent interfered with free choice in the election by distributing two paychecks to employees instead of the one they usually received. In light of the *Aldon* line of cases, our dissenting colleague plainly errs in characterizing our decision as being "directly contrary to 30 years of Board law."

Faced with the existence of two lines of apparently conflicting case law, we believe, contrary to our dissenting colleague, that it is our responsibility to reexamine and clarify the precedent. Thus, it is well established that the Board must "follow, distinguish, or overrule its own similar cases." *Douglas Brown v. NLRB*, 462 F.2d 766, 702 (9th Cir. 1972). Indeed, the reviewing judiciary has made clear that what the Board may *not* do is "reach diametrically opposite conclusions on the basis of virtually identical fact situations . . . in a series of opinions which typically offer no explanation for their result other than a recitation of the pertinent facts." *Seafarers Local 777 v. NLRB*, 603 F.2d 862, 869 (D.C. Cir. 1978), petition for rehearing denied 603 F.2d at 891 (1979). Our dissenting colleague's continued application of what he terms the "traditional all the circumstances test" does nothing to clarify the confusing state of the law.

In sum, the Board's prior case-by-case analysis of all the surrounding circumstances has given rise to extensive litigation, delay, and rulings that are difficult to reconcile. Today, we have substituted a "clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results." *Midland National Life Insurance Co.*, 263 NLRB at 132. As stated in *American Hospital Assn. v. NLRB*, 899 F.2d 651, 659 (7th Cir. 1990), *affd.* 499 U.S. 606 (1991): "A rule makes one or a few of a mass of particulars legally decisive, ignoring the rest. The result is a gain in certainty, predictability, celerity, and economy, and a loss in individualized justice. Often the tradeoff is worthwhile; at least the prevalence of rules in our legal system so suggests."

#### V. APPLICATION OF THE RULE TO THE FACTS OF THIS CASE

Having adopted the rule, we now apply it to the facts of this case.<sup>12</sup> The election was held on a Friday, a normal payday, and the Respondent paid its employees that day at the end of their shift in accordance with its past practice. Therefore, the Respondent did not change the time of the paycheck distribution.

The record shows, however, that within the proscribed period the Respondent made three changes in its paycheck process. The Respondent changed the paycheck itself (i.e., it issued split paychecks to employees instead of its standard single paycheck). In addition, the Respondent changed the location of the paycheck distribution (i.e., the paychecks were distributed at the Respondent's facility instead of at the off-premises jobsite). Finally, the Respondent changed the method of paycheck distribution (i.e., the paychecks were distributed by a company secretary instead of by the construction foremen).

There is no evidence that these changes were motivated by a legitimate reason unrelated to the election. On the contrary, it is evident from the campaign propaganda accompanying the altered paychecks that the changes in the paycheck process were motivated by the Board election.

Accordingly, we shall set aside the results of the May 13, 1994 election and order that a new election be held.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Kalin Construction Company, Inc., Sodus, Michigan, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Threatening its employees with the loss of life insurance or other benefits if they choose the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Sodus, Michigan facility copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on

<sup>12</sup> In accordance with our usual practice, we shall apply our new rule not only "to the case in which the issue arises," but also "to all pending cases in whatever stage." *Midland National Insurance Co.*, *supra* at 133 fn. 24, quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958).

<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 12, 1993.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held in Case 7-RC-20175 is set aside, and that case is severed and remanded to the Regional Director to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[Direction Of Second Election omitted from publication.]

MEMBER COHEN, dissenting in part.

My colleagues have overruled three decades of Board law. Worse, their new principle imposes a substantial restraint on free speech. As to the first point, I believe that the doctrine of *stare decisis* is a fundamental value in our legal system. As to the second point, I believe that free speech is a bedrock of an open society. Accordingly, I vigorously dissent.

The Respondent in this case wished to tell employees that selection of a union can result in the forced payment of union dues, with a consequent deduction from their paychecks. It is clear and uncontested that this message is privileged under the Act. It is similarly uncontested that the message would be privileged even if it were placed in a pay envelope. However, my colleagues contend that the conveyance of that same message, in graphic form, is objectionable. In essence, my colleagues believe that an employer could tell an employee, for example, that his \$200 paycheck will be reduced by \$25 for union dues, but the employer cannot illustrate this same message by giving the employee two checks (one for \$175 and one for \$25) with an explanation that this is being done to show the impact of union dues.

I would not draw the distinction between verbal speech and graphic illustration. It is clear that a mes-

sage need not be verbal in order to enjoy protection under the First Amendment.<sup>1</sup> Graphic communication is also protected. Demonstrations,<sup>2</sup> wearing black armbands to school,<sup>3</sup> and indeed the burning of a flag,<sup>4</sup> enjoy protection as free speech, even if the messages are repugnant.

Further, Section 8(c) of the Act specifically protects the expression of views, arguments, and opinions, even if they are couched in "graphic" form.

Concededly, Section 8(c) pertains only to unfair labor practice cases. However, "the strictures of the first amendment . . . must be considered in all cases."<sup>5</sup> In representation cases, there are a few principles under which some limited restraints on free speech are tolerated. My colleagues seek to justify their new rule by trying to fit into those principles. However, the "fit" is not even close. For example, my colleagues say that an employer who splits the paycheck is "in effect" making a *Peerless Plywood* speech.<sup>6</sup> That case condemns, as objectionable, a captive audience speech made to assembled employees, if it occurs within the 24-hour period prior to an election. The *Peerless Plywood* rule is aimed at preventing the "mass psychology" that can be created by such speeches. By contrast, the Employer's conduct at issue here does not involve a captive audience speech made to assembled employees. Nor does it involve a risk of "mass psychology." Each employee, acting as an individual, picks up his or her paycheck and promptly departs. In short, this case has nothing whatever to do with *Peerless Plywood*.

Previous efforts to expand *Peerless Plywood* have been rejected.<sup>7</sup> Indeed, in one case, the Board rejected an expansion similar to the one embraced by my colleagues here. In *Moody Nursing Home*, 251 NLRB 147 (1980), the employer placed a message inside the pay envelope. The message told employees that representation by a union would mean a paycheck reduction equal to the amount of union dues. This conduct occurred within 24 hours of the election. The Board squarely rejected a contention that this conduct was proscribed by *Peerless Plywood*.

<sup>1</sup> *Texas v. Johnson*, 491 U.S. 397, 403-404 (1989).

<sup>2</sup> *Bachellar v. Maryland*, 397 U.S. 564 (1970).

<sup>3</sup> *Tinker v. Des Moines School District*, 393 U.S. 503, 505-506 (1969).

<sup>4</sup> *Texas v. Johnson*, supra, and *Street v. New York*, 394 U.S. 576 (1969).

<sup>5</sup> *Dal-Tex Optical Co.*, 137 NLRB 1782 fn. 11 (1962).

<sup>6</sup> *Peerless Plywood*, 107 NLRB 427 (1953).

<sup>7</sup> *DeCasper Corp.*, 278 NLRB 143, 146 (1986); *Electro-Wire Products*, 242 NLRB 960 (1979); *Vita Food Products*, 116 NLRB 1215, 1218 (1956); *Crown Paper Board*, 158 NLRB 440 (1966); *Mar-Jac Poultry Co.*, 123 NLRB 1572, 1573 (1959); *Peachtree City Warehouse*, 158 NLRB 1031, 1039-1040 (1966); *Conroe Creosoting Co.*, 149 NLRB 1174, 1182 (1964); and *Doughboy Plastic Production*, 122 NLRB 338, 341 (1958).

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I recognize that *Moody* involves a message in a paycheck, rather than a split paycheck designed to convey the same message. However, if the written message is not a “captive audience” speech, it is difficult to see how a split paycheck would be a captive audience speech. Frankly, it strains credulity, as well as the English language, to say that a split paycheck is a captive audience speech.

My colleagues also refer to *Milchem*, 170 NLRB 362 (1968). Again, the fit is not even close. That case condemns “prolonged conversations” between a party and the employees who are waiting to cast a ballot. The instant case does not involve that fact pattern. A split paycheck is not a “prolonged conversation.”

Finally, as noted above, my colleagues’ position is directly contrary to 30 years of Board law. That is, my colleagues would set aside an election based solely on the issuance of split paychecks. In at least 15 cases, such conduct has been found to be permissible.<sup>8</sup> In nine other cases, the election was set aside based on misrepresentations and/or intimidating conduct in connection with the split paycheck.<sup>9</sup>

Of course, misrepresentation is no longer a basis for setting aside an election. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). Intimidating conduct in connection with the split paycheck can be a basis for doing so. However, my colleagues would set aside an election based solely on the split paycheck within the 24-hour period. There is no case which reaches this per se result.<sup>10</sup> And, as noted above, there are many cases which reach the contrary result, i.e., a split paycheck is not a per se basis for overturning an election. Thus, my colleagues are wrong when they say that the cases are inconsistent. The cases consistently reject the

<sup>8</sup> *Offshore Shipbuilding*, 274 NLRB 539 (1985); *Patchett’s Bus Transportation Co.*, 253 NLRB 996 (1981); *Moody Nursing Home*, supra; *Coco Palms Resort Hotel*, 208 NLRB 966 (1974); *William Carter Co.*, 208 NLRB 1 (1973); *Tunica Mfg. Co.*, 182 NLRB 729 (1970); *TRW, Inc.*, 173 NLRB 1425 (1968); *Fasco Industries*, 173 NLRB 522 (1973); *Fontaine Truck Equipment Co.*, 166 NLRB 576 (1967); *Winn-Dixie Stores*, 166 NLRB 227 (1967); *Caressa, Inc.*, 158 NLRB 1745 (1966); *Conroe Creosoting Co.*, supra; *Mosler Safe Co.*, 129 NLRB 747 (1960); *Geyer Mfg. Co.*, 120 NLRB 208 (1958); and *Montrose Hangar Co.*, 120 NLRB 88 (1958).

<sup>9</sup> *Ereno Lewis*, 217 NLRB 239 (1975); *Justus Co.*, 199 NLRB 422 (1972); *Sportcraft Homes*, 186 NLRB 891 (1970); *Bryan Bros. Packing Co.*, 171 NLRB 352 (1968); *Brandenburg Telephone Co.*, 164 NLRB 825 (1967); *Yazoo Valley Electric Power Assn.*, 163 NLRB 777 (1967); *Crown Laundry & Dry Cleaners*, 160 NLRB 746 (1966); *Peachtree City Warehouse*, supra; and *Trane Co.*, 137 NLRB 1507 (1962).

<sup>10</sup> *Aldon, Inc.*, 201 NLRB 579, 588 (1973), does not hold that the use of a split paycheck is per se objectionable. The facts of that case are somewhat obscure, inasmuch as the entire discussion is buried in a brief recitation at the end of the judge’s decision. (The Board does not mention the point at all.) The recitation indicates that, as a result of split paychecks, the employees had to pay more to cash their checks. This fact was sarcastically commented upon by the employer’s agent who said that “this was a cheap lesson to learn about union dues.”

per se approach, and they consistently evaluate the circumstances surrounding the conduct. My colleagues now change that law by adopting a per se approach.

On a related point, my colleagues refer to court cases that criticize the Board for being inconsistent. It is somewhat strange that my colleagues would make this reference. In fact, there are no court decisions which criticize the Board for inconsistency in its approach to the “split paycheck” issue. Perhaps, this is because there is in fact no inconsistency. Indeed, it is my colleagues who now create the inconsistency by overturning 30 years of precedent. Thus, my colleagues invite the very judicial criticism to which they refer.

In sum, my colleagues’ rule concerning split paychecks flies in the face of precedent and restrains free speech. I therefore disagree with the rule.

My colleagues do not stop with the rule concerning split paychecks. They would also overturn an election if any one of the following events occur within the 24-hour period before an election, unless the employer can show a legitimate reason for the conduct:

1. Changes in the time of paycheck distribution.
2. Changes in the location of paycheck distribution.
3. Changes in the method of paycheck distribution.

My quarrel with this part of the rule is two-fold. First, it makes a given change a “per se” ground for setting aside the election. This approach is at odds with the historic approach of looking at conduct within the context of surrounding circumstances. Secondly, I believe that my colleagues have misplaced the burden of proof. In this latter regard, they say that the conduct is objectionable only if it is for the purpose of influencing the election. They also acknowledge the familiar rule that the burden of proof is placed on the objecting party. However, without explanation, they do not place the burden on the objecting party to show improper motive. Instead, they place the burden on the other party to show a benign motive.<sup>11</sup>

#### The Instant Case

The application of the traditional “all the circumstances” test leads to the conclusion that the election here should be set aside. The place and method of distributing paychecks were changed for the purpose of influencing the election. The employees had to run through the Employer’s gauntlet in order to vote. In

<sup>11</sup> Unlike my colleagues, I do not read *Stanton Industries*, 313 NLRB 838 (1994), as changing the traditional rule that the burden of proof is on the objecting party. The relevant part of *Stanton* (fn. 2) merely changes the rationale of a part of the judge’s decision. The cases cited in the footnote reaffirm the traditional rule that the objecting party must establish its case through evidence, and such evidence can be rebutted by the other side.

these circumstances, I join my colleagues in setting aside the election. But, for the reasons set forth above, I vigorously dissent from their reasons for doing so.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with the loss of life insurance or other benefits if they vote for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

#### KALIN CONSTRUCTION COMPANY, INC.

*George M. Mesrey, Esq.*, for the General Counsel.  
*Richard A. Buntele, Esq.* (The Fishman Group), of Bloomfield Hills, Michigan, for the Employer.  
*John W. Cobe*, of Kalamazoo, Michigan, for the Union.

## DECISION

### STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on October 6 and 7, 1994, in St. Joseph, Michigan, upon a complaint, dated December 28, 1993, charging the Respondent, Kalin Construction Company, Inc. with violations of Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening (a) "to render the organizing efforts of its employees futile by causing a two-year delay" and threatening (b) "to eliminate its employees' life insurance coverage if they chose to be represented by" the Union. The Respondent's answer, dated, January 5, 1994, denied the commission of the unfair labor practices.

Pursuant to a petition, an election was conducted on May 13, 1994, among the Respondent's employees in the following unit:

All full-time equipment operators are mechanics employed at or out of the Employer's facility located at 2663 Yore Avenue, Sodus, Michigan; but excluding all clerical employees, truck drivers, laborers, and guards and supervisors as defined in the Act.

Out of 29 valid votes counted, 24 were cast against the Union. The Union filed its objections to the election. Of the seven objections, four were withdrawn. By order of June 14, 1994, the Regional Director directed that the three remaining objections be heard by an administrative law judge and be consolidated with the hearing in the unfair labor practice case.

On the entire record, including my observations of the witnesses, and on consideration of the briefs filed by the Respondent and the Union, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Kalin Construction Company, Inc., with a facility located in Sodus, Michigan, is a contractor engaged in the preparation of site work for roads, highways, malls, parking lots, building construction, and the processing and excavation of gravel. With the purchase of goods and services in excess of \$50,000 directly from points located outside the State of Michigan, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Local 324, A, B, C, & D, International Union of Operating Engineers, AFL-CIO, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

The president of Kalin Construction is Gerald Kalin. His wife, Cheryl Kalin, is employed as corporate secretary and, with a 6-percent ownership, she is a member of the corporate board.

### II. FACTS

Local 324 attempted to organize the employees in the middle of 1993. On October 5, 1993, the Union filed its petition for an election. In the meantime, the Respondent met with the employees and conducted its own campaign against the Union. More specifically, on October 23, 1993, at about 9 a.m., the Company's president, Kalin, held a meeting with several employees in a meeting room at the construction office to discuss the Union. In the presence of other supervisors, Kalin made the following statement, according to the testimony of employee Trace Lippman (Tr. 17): "He said that his attorney informed him that they could delay this vote for up to two years."

Kalin denied in his testimony that he either referred to his attorney, or that he could delay the process. Kalin testified that to the best of his recollection he said that "they have about a year to get cards and to have an election and . . . another year to negotiate a contract . . . one plus one equals two" (Tr. 190).

Glen Kalin, who is a cousin of Gerald Kalin and employed by the Company as a leadman, similarly testified that he did not recall Kalin talking about the possibility of delaying the union process (Tr. 155, 161). Gary Tietsema, also employed by Kalin Construction, testified that he was present at the meeting and that he did not "hear Mr. Kalin make any statements to the effect that attorneys could delay the process for up to two years" (Tr. 164).

Although Lippman impressed me generally as a credible witness, I am not convinced that Lippman's recollection was sufficiently precise to permit a determination that Kalin's statement amounted to a threat rather than a statement explaining the duration of the process. At a certain point in Lippman's testimony, he was uncertain about Kalin's statement (Tr. 28-29). I accordingly credit Kalin's own recollection of his statement during the meeting, a statement which was corroborated by two witnesses. His remark did not violate the Act.

Another subject discussed during the October 23, 1993 meeting concerned life insurance. Kalin compared the life insurance of the Union with the life insurance provided by the Company. Several employees stated that they were unaware that the Company provided life insurance. Kalin suggested to them that they speak to Cheryl Kalin, his wife and secretary, and to sign the necessary beneficiary cards. When the meeting was over, Lippman went to her office to sign up for the insurance program. He testified as follows about the ensuing conversation (Tr. 18):

While she was handing me the paper work to sign for the life insurance she informed me that if we went union, if the vote went the union, that that would be either canceled or would be void—it would no longer—we would go with the union life insurance.

In her testimony, Cheryl Kalin admitted discussing life insurance with one or more employees and saying something to the effect “you will have one or the other, but you will not have double” (Tr. 185–188).

Her testimony as it appears in the record was vague and generally unreliable. Her demeanor as a witness did not change my impression that her recollection was hazy at best. The record also supports a finding that Cheryl Kalin was an agent of the Company. She was a member of the corporate board, held a 6-percent interest in the ownership of the Company and, as wife and corporate secretary, was certainly perceived by the employees as a representative of management. Memoranda issued by management about the Union contained the names of Jerry Kalin and Cheryl Kalin (G.C. Exhs. 3, 4). Clearly, she represented herself as a member of management. Her statements to the employees are accordingly binding on management which in turn is responsible for her conduct.

I find that her statements constituted a threat of loss of company benefits if the employees voted in favor of the Union and that such a threat violated Section 8(a)(1) of the Act.

### III. THE OBJECTIONS

The Union had filed seven objections to the conduct of the election. Four of the objections were withdrawn (G.C. Exh. 1(p)). The three remaining objections are numbered 1, 6, and 7:

1. The employer has threatened loss of employee benefits.
6. The polling area was changed at election time without union knowledge.
7. The employer campaigned in the polling area.

The Union’s Objection 1 is closely related to the allegation in the complaint as discussed above. Accordingly, I sustain the Union’s Objection 1 to the effect that the Respondent threatened the loss of employee benefits.

The objection that the voting area was relocated without the Union’s knowledge is not supported by the record. The election was scheduled for May 13, 1994, at 4 p.m. The Board’s agent, Alex Kassel, arrived at the Kalin facility, at about 3:30 p.m. and, accompanied by John Cobe, the Union’s representative, inspected an office in the shop area, marked “A” on a diagram of the Kalin facility (R. Exh. 2).

Kassel proceeded to prepare the room when the Company’s attorney, Richard Buntele, entered and announced that the room would be changed to another room, described as a garage office. Kassel prepared that room, identified as “B” on the employer’s diagram of the facility (R. Exh. 2). Neither Kassel nor Cobe objected to the use of that room as the voting area (Tr. 109, 237). The record shows that that room was properly designated and used as the voting or polling area.

The record however shows that the routing or the access to the polling area was changed (Tr. 109–117). Initially, when the election process began, the voters entered through an overhead garage door, marked “D” on the diagram, as they proceeded to the polling area “B” (R. Exh. 2). Approximately 10 or 15 minutes later, a truck moved into the bay and Kassel moved the entrance way from the overhead garage door to the service entrance, near the initially designated office, marked “A” on the diagram. Kassel explained in his testimony that after the truck had parked in the garage and the overhead garage door had closed, he placed a printed sign marked “voting area” to the service entrance. Even though, voters were not prevented or in any way hindered from entering the voting room, the Union regarded this change as a change in the polling area, particularly because Cobe had not noticed the change until about 5 p.m. (Tr. 108). The only practical effect of this change of access was that the employees were routed more directly to an entrance area (“A”) where a secretary handed each voter an envelope containing their paychecks. However, it is clear that the employees would have obtained their paychecks in any case even if the access route had been more circuitous. In sum, the record clearly shows that the change of the actual polling area (from room “A” to room “B”) was not opposed by the Union, and that the change in the access to the polling office did not prevent or hinder the voting process. I accordingly overrule that objection by the Union.

The last objection (Objection 7) presents a more difficult issue. The record shows that as the voters entered the service entrance to vote, Edith Leva, Respondent’s secretary, passed out to each employee an envelope containing split paychecks and printed notes (Tr. 47–50, 61, 181–182). The notes reminded the employees as follows (R. Exhs. 3, 4):

#### NOTICE:

Due to the current Organizing Drive the Operating Engineers Union is conducting, we feel obligated to inform you of the effects of joining such an Organization. Examine Your Check carefully, for this is ALL you will receive each week UNDER UNION REPRESENTATION.

Now, open the other envelope . . .

This is the amount of your benefits that we pay you in cash each week as part of your pay. We have always thought that most Employees knew what to do with their OWN MONEY. Under Union rules, we will send this Money to THEM, for which they will **CHARGE YOU MORE MONEY TO HANDLE!**

If you have any questions, please contact Cheryl or Jerry. Our doors are always open.

According to testimony of Board Agent Alex Kassel, the secretary was about 30 to 35 feet from the threshold of the voting area (Tr. 249). Although, he ordinarily maintains an

area up to 40 feet free of interested parties, her position was at the edge of such an area. Kassel also observed the Company's lawyer, Richard Buntele, in the service area briefly towards the end of the election period and a few employees speaking to the secretary as she passed out the envelopes. In addition, some employees were milling about outside the building after they had voted and some employees saw the Company's president, Kalin, approximately 15 feet from the building entrance speaking briefly to one voter (Tr. 108, 139).

The record, however, does not show, apart from the activity of secretary Leva, that any campaigning occurred in the polling area. Although the Board has held in the past, documents inserted with employees' paychecks referring to deduction for union dues to be a legitimate reminder, the Employer's actions here have gone too far. In *Patchett's Bus Transportation Co.*, 253 NLRB 996 (1981), the Board stated that those documents, accompanying the paychecks issued immediately prior to the start of the election and reminding voters that union dues could be deducted from employees' paychecks, constitute legitimate campaign propaganda which do not interfere with the employees' freedom of choice. Here, however, the Employer engaged in such propaganda *during* the election and within an area, not only off limits to union campaigners, but also adjacent to the actual polling area. Moreover, the message in the printed documents represented that union dues *would* be deducted. This message was underscored by split paychecks which demonstrated the actual amounts which the employer would deduct. Such a message incorrectly represents that employees had no choice

in negotiating a contract with a union security clause. Passing out paychecks to employees in this manner apparently deviated from the Respondent's past practice as employees were usually paid at the jobsite, but it also afforded the employer to check off employees who had voted. Considering the Respondent's technique in its entirety, particularly its inaccurate depiction in its campaign propaganda distributed during the election in an area directly adjacent and almost within the polling area, I sustain the Union's objection. *Milchem, Inc.*, 170 NLRB 362 (1968).

#### CONCLUSIONS OF LAW

1. The Respondent, Kalin Construction Company, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to eliminate its employees' life insurance coverage if they voted for the Union, the Respondent violated Section 8(a)(1) of the Act.

4. The unfair labor practices of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]