

Virginia Concrete Corporation, Inc. and Andres Delgado, Petitioner and International Brotherhood of Teamsters, Local Union 639, AFL-CIO.
Case 5-RD-1253

July 26, 2001

DECISION AND DIRECTION OF SECOND
ELECTION

BY MEMBERS LIEBMAN, TRUESDALE, AND
WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held December 20, 2000, and the hearing officer's report concerning disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 78 for and 86 against the Union, with 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations¹ with respect to Objections 4 and 8, and finds that the election must be set aside and a new election held. Specifically, we adopt the hearing officer's findings that Plant Manager David Gray's offer of "Vote No" T-shirts directly to four employees and Vice President of Sales Richard Franey's offer of "Vote No" buttons directly to two employees constituted objectionable conduct. Further, in light of the closeness of the election, we find that Gray's and Franey's conduct was sufficient to warrant setting aside the election. If the six individuals whose ballots were challenged were eligible and voted for the Union, a change in as few as three votes would have altered the outcome. The hearing officer found that at least six employees were directly affected by the conduct of Gray and Franey. In such circumstances, the objectionable conduct of Gray and Franey cannot be found to be de minimis. See *Rexall Corp.*, 272 NLRB 316 (1984). Thus, based on the conduct of Gray and Franey, we agree with the hearing officer that Objection 8 should be sustained.²

We further adopt the hearing officer's finding that President Diggs Bishop's threat that employees could be

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

² We therefore find it unnecessary to pass on the hearing officer's additional findings that employee Andy Clark was an agent of the Employer for purposes of distributing "Vote No" T-shirts and that Sherry Coward, a statutory supervisor, observed and ratified Clark's distribution of the T-shirts.

permanently replaced and lose their jobs constituted objectionable conduct. In his December 15, 2000 letter to employees urging them to vote against the Union in the December 20 election, Bishop reminded employees that "continued union representation carries with it the risk [of] STRIKES." The letter then stated that "striking employees receive no wages, lose their health insurance and other benefits, do not receive unemployment compensation, and can be permanently replaced and therefore lose their jobs here at Virginia Concrete."

It is well established that an employer may not tell employees, without explanation, that they could lose their jobs to permanent replacements in the event of a strike. *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989). As the Board held in *Laidlaw Corp.*, 171 NLRB 1366, 1368-1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), permanently replaced economic strikers who make unconditional offers to return to work have the right to full reinstatement when positions become available and the right to be placed on a preferential hiring list until that time. An employer must not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with *Laidlaw*. *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982); see also *Larson Tool*, 296 NLRB at 895. When the employer combines the possibility of permanent replacement with the prospect of job loss, "it is not reasonable to suppose that the ordinary employee will interpret the words to mean that he/she has a *Laidlaw* right to return to the job." *Baddour, Inc.*, 303 NLRB 275 (1991). See also *AutoZone, Inc.*, 315 NLRB 115 (1994), enfd. mem. 83 F.3d 422 (6th Cir. 1996), cert. denied 519 U.S. 948 (1996) (employer unlawfully equated permanent replacement with job loss).³ Accordingly, we find that the Employer threat-

³ This case is distinguishable from *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503 (4th Cir. 1998), where the court found that the employer's statement that employees could lose their jobs if they went out on strike was explanatory, not threatening. The language in *Pirelli Cable* was part of a four-page letter explaining the employer's bargaining stance and its concerns about a potential strike. The letter contained a detailed explanation of the economic rationale of the employer's position, including a discussion of its recent financial difficulties and the decline in both the demand for and the price of its products. The letter further emphasized the employer's continuing desire to reach agreement with the union. The letter also included a series of nine questions and answers (Q&A) designed to convey information about the consequences of a decision to strike. The statement at issue, which was part of the Q&A, stated that if the employees were to strike "in an attempt to force the Company to agree to the Union's economic demands or to force the Company to withdraw its economic demands, the Company may permanently replace you. When the strike ends, you would not have a job if you had been permanently replaced." 141 F.3d at 516. In the overall context of the letter, the court found this statement to be an explanation of employees' *Laidlaw* rights rather than a threat of reprisal for strike

ened job loss in the event of a strike without an explanation of the employees' *Laidlaw* rights and, therefore, we sustain the Union's Objection 4.

We find, for the reasons set forth in the hearing officer's report, that this issue was fully and fairly litigated. In arguing that it was not fully litigated, the Employer relies on *Precision Products Group*, 319 NLRB 640 (1995); *Iowa Lamb Corp.*, 275 NLRB 185 (1985); and *Bell Halter, Inc.*, 276 NLRB 1208, 1220 fn. 12 (1985). All are distinguishable. In *Precision Products*, the Board held that the hearing officer improperly considered an objection that had been specifically withdrawn by the petitioner. The Board found that the withdrawal of the objection put the employer on notice that it would not have to litigate the issue. In *Iowa Lamb*, the statement relied on by the hearing officer as objectionable was not identified by the Regional Director as an issue, the hearing officer did not inform the parties he would consider it, and it was "wholly unrelated" to the issues set for hearing. Similarly, in *Bell Halter*, the judge noted that the work rule for which an employee was discharged was invalid, but he did not pass on the issue because the illegality of the rule was not alleged in the complaints, cited as a basis for objections, addressed at the hearing, or

activity. Here, neither the context of the letter urging the employees to decertify the Union, nor the language of the letter itself, supports a conclusion that the letter was an explanation of *Laidlaw* rights rather than a threat. Nor does either context or language negate the Employer's equation of permanent replacement with job loss.

briefed by either party. By contrast, in this case, the letter containing the threat of job loss was attached as an exhibit to the Regional Director's report and introduced in evidence at the hearing. Employees were questioned about their receipt of the letter. The hearing officer specifically requested that the parties brief the legality of the very paragraph on which he ultimately relied. Finally, the issue was not "wholly unrelated" to Objection 4, which expressly alleges threats of job loss.

Finally, we find that either or both of the foregoing objections warrant ordering a new election.⁴

[Direction of Second Election omitted from publication.]

⁴ In agreement with the hearing officer, Member Liebman would also sustain Objection 5 regarding the Employer's statement, in the same December 15 letter discussed above, strongly urging employees who wished to earn additional income through the income growth plan to vote against the Union. Regardless of whether the Union rejected the plan or the Employer removed it from the bargaining table before the letter was sent, it is uncontested that the proposal was no longer on the table. Thus, Member Liebman would find that the Employer implicitly promised employees a new benefit in exchange for a vote against the Union. See, e.g., *Morgan Services, Inc.*, 284 NLRB 862, 863-864 (1987) (employer unlawfully promised new grievance procedure if employees voted to decertify union); and *Ausable Communications, Inc.*, 273 NLRB 1410, 1415-1416 (1985) (employer unlawfully implicitly offered improved conditions of employment and new benefits to discourage union support in election). She further finds that Objection 5 provides a sufficient independent basis for ordering a new election. Members Truesdale and Walsh find it unnecessary to pass on Objection 5.