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

May 9, 2003

SUPPLEMENTAL DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 15, 2001, and the administrative law judge's report concerning disposition of them. The election was conducted pursuant to a Decision and Direction of Second Election. 334 NLRB 796 (2001). The tally of ballots shows 81 for and 97 against the Union, with 5 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the judge's findings and recommendations only to the extent consistent with this Supplemental Decision and Certification of Results of Election. As explained below, we find that the judge erred in sustaining the Union's objections and recommending that the election be set aside. We therefore overrule the objections and certify the results of the election.

I. FACTS

For a number of years, the Union has represented the Employer's drivers. On July 25, 2000, a decertification petition was filed. On September 30, 2000, the parties' collective-bargaining agreement expired. In the fall of 2000, the parties negotiated, but were unable to reach, a new agreement. Among other things, their negotiations included a discussion of a wage increase.

The first decertification election was held on December 20, 2000. The Union lost the vote and filed objections, some of which were set for hearing.

In March 2001,[1] while the Union's objections were pending, the Employer unilaterally announced and implemented a 50-cent wage increase—the same amount the Employer had offered to the Union during bargaining in fall 2000—retroactive to October 2000. On April 10, the Union filed an unfair labor practice charge, alleging in part that the wage increase violated Section 8(a)(1). The Union withdrew this charge in February 2002.

On April 27, the Employer sent a letter to employees notifying them, among other things, of the Union's unfair labor practice charge. The letter erroneously stated that the charge would result in employees losing the pay increase, and characterized the Union's charge as an "attempt[ ] to take away" the increase.

On July 2, the Board sustained two of the Union's objections to the December 2000 election and ordered a second election. See *Virginia Concrete Corp.*, 334 NLRB 796 (2001). On July 5, the Employer distributed a memorandum notifying employees of the Board's decision and urging them to vote no in the second election. The memorandum also stated that "[o]n a separate matter—your [50-cent] per hour pay raise—we are continuing to fight on your behalf to keep the money. The union, however, is still arguing to the Government that the pay raise should be taken away from you."

On July 17, the Union filed an unfair labor practice charge alleging that the Employer violated Section 8(a)(1) by telling employees that the Union had filed charges to take away the pay increase. The Union withdrew this charge shortly before the second election, and there are no other unfair labor practice charges before the Board.

The second election was held on August 15. On August 14, within 24 hours before the election, the Employer sent a brief, electronic "Vote No" message that appeared on small text messaging screens in the unit employees' trucks.

The Union lost the August 15 election and filed objections. After a hearing, the judge recommended sustaining four of the objections and ordering a third election. In issuing his report, however, the judge failed to consider the Employer's posthearing brief, which was timely filed but never received by the judge. The Employer excepted, among other things, to the judge's failure to consider its brief. The Employer argued that a hearing de novo before a different judge or hearing officer was necessary to remedy the judge's failure to consider the brief. In an unpublished Order issued June 26, 2002, the Board denied the Employer's request for a hearing de novo, but remanded the case to the judge to consider the Employer's brief and issue a supplemental report.

In his supplemental report, the judge addressed the arguments in the Employer's brief and reached the same conclusions reached in his original report: he recommended sustaining four objections, overruling two others, and ordering a third election. Specifically, the judge found that the Employer interfered with the election by ignoring and bypassing the Union in granting a 50-cent wage increase (Objection 1), failing to recognize the Union as the exclusive bargaining representative (Objection 5), telling employees that the Union had filed charges to take away their wage increase (Objection 2), and sending

[1] All dates are in 2001 unless otherwise specified.

the electronic "Vote No" message to employees' trucks within 24 hours before the election (Objection 4), which the judge found amounted to a captive audience speech in violation of *Peerless Plywood Co.*, 107 NLRB 427 (1953).

The Employer filed exceptions, and the Union filed an answering brief asking the Board to affirm the judge's findings. The Employer argues that the judge erred in sustaining each of the objections. The Employer also reiterates its argument, made prior to the remand, that the Board should order a hearing de novo because the judge did not consider the Employer's posthearing brief before issuing his initial report.

For the reasons set forth below, we deny the request for a hearing de novo, but we agree with the Employer that the judge erred in sustaining the Union's Objections 1, 2, 4, and 5. Accordingly, we overrule the objections and certify the results of the election.[2]

II. ANALYSIS

A. Employer's Request for Hearing De Novo

The Employer argues that it is entitled to a hearing de novo before a different judge or hearing officer, and that remanding the case to the same judge was inadequate, in part because the judge was biased.

We disagree. In our remand Order issued June 26, 2002, we denied the Employer's request for a hearing de novo. That ruling is now the law of the case. See, e.g., *Technology Service Solutions*, 332 NLRB 1096 fn. 3 (2000), order modified on reconsideration on other grounds 334 NLRB 116 (2001). To the extent the Employer argues that the judge's findings on remand reflect bias, we have carefully reviewed the judge's supplemental report, and we find no evidence that he prejudged the case or that he demonstrated bias.

B. Objection 1: Ignoring and Bypassing The Union in Granting Employees a 50-Cent Wage Increase

Objection 1 alleges that the Employer interfered with the election by "[i]gnoring and bypassing the Union in granting a [50-cent] an hour raise." The Employer granted the wage increase at a time when the Union's objections to the December 2000 election were pending. The judge recommended sustaining the objection, relying on *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), enfd. denied 512 F.2d 684 (8th Cir. 1975). In that case, the Board held that an employer acts "at its peril" in making unilateral changes while objections to an initial representation election are pending, because those changes will violate Section 8(a)(5) if the election ultimately results in certification of the Union. Id. at 703.

The Employer excepts. First, the Employer argues that the Board must overrule Objection 1, because it is based on conduct that was the subject of a withdrawn unfair labor practice charge. Second, the Employer argues that *Mike O'Connor* is inapplicable because it involved allegations that an employer violated Section 8(a)(5). In the present case, there are no pending unfair labor practice charges. The Employer argues that instead of applying *Mike O'Connor*, the Board should apply the standard used in representation cases to evaluate preelection grants of benefits that are alleged to be objectionable. Under this standard, the Employer argues, the wage increase is not objectionable.

We disagree with the Employer that the withdrawn unfair labor practice charge requires us to overrule this objection. We agree, however, that *Mike O'Connor* is inapplicable and that the objection should be overruled on its merits.

1. The withdrawn unfair labor practice charge

Prior to the second election, the Union filed a charge alleging that the March wage increase violated Section 8(a)(1). The Union withdrew that charge in February 2002, about 6 months after the second election. According to the Employer, conduct that is the subject of a withdrawn unfair labor practice charge cannot be the basis for an objection. The Employer relies on *Ellicott Machine Corp.*, 54 NLRB 732 (1944), in which the Board stated: "[W]here charges are withdrawn without prejudice to facilitate the determination of a representation proceeding, we shall treat the withdrawal of the charges without prejudice as an automatic waiver by the petitioning union of the right to use the subject matter of those charges as a basis for objections to the election." Id. at 735.[3] For two reasons, we find that *Ellicott* does not require us to overrule Objection 1.

First, *Ellicott* is distinguishable, because it addressed the withdrawal of charges *before* an election. Here, the Union did not withdraw the charge relating to Objection 1 until almost 6 months *after* the election. Therefore, the charge was not withdrawn "to facilitate the determination of a representation proceeding," as in *Ellicott*.

Second, we find that *Ellicott* is inconsistent with current Board law and practice. In *Great Atlantic & Pacific Tea Co.*, 101 NLRB 1118, 1119–1120 (1952), the Board overruled an entire line of cases applying the type of

[2] In the absence of exceptions, we adopt pro forma the judge's recommendation to overrule Objections 3 and 12.

[3] The Board has never cited *Ellicott* for this principle. An administrative law judge applied *Ellicott* in *Redway Carriers, Inc.*, 274 NLRB 1359, 1367–1368, 1404–1405 (1985), but the Board did not pass on that issue. See *Redway*, supra at fn. 3.

waiver analysis used in *Ellicott*. Specifically, the Board stated that it had "reconsidered the question whether and when a party should be permitted to object to an election on the basis of conduct of which it had knowledge before the election, if it neither filed charges nor otherwise protested such conduct to the Board until after the election was over." The Board announced that it would no longer apply a "rule of estoppel." Instead, in determining whether to set aside the election, the Board would consider any substantial interference during the critical preelection period, whether or not unfair labor practice charges were filed. The Board plainly stated that the absence of unfair labor practice charges regarding preelection conduct would not operate as a waiver of a party's right to object to that conduct. Id. at 1120–1121. The Board explicitly overruled several cases that had found such a waiver, and stated that it was also overruling "other cases to the same effect." Id. at fn. 6. Although *Ellicott* was not one of the cases listed as being overruled, we consider it a case "to the same effect." We now explicitly overrule *Ellicott* and hold that the withdrawal of an unfair labor practice charge does not operate as a waiver of party's right to file objections based on the same conduct.[4]

2. The merits of Objection 1

The Employer argues, and we agree, that the judge erred in relying on *Mike O'Connor*, supra, to sustain Objection 1. *Mike O'Connor* involved allegations that an employer violated Section 8(a)(5). In the present case, there is no allegation before the Board that the Employer violated Section 8(a)(5). The only issue is whether the Employer's preelection wage increase interfered with the election. We have found no prior decisions applying *Mike O'Connor* in a representation case, like this one, in which there is no 8(a)(5) violation at issue. Therefore, *Mike O'Connor* does not provide a basis for sustaining Objection 1 in this case.[5]

We agree with the Employer that the wage increase should be evaluated under the principles used by the Board to determine, in representation cases, if a preelection grant of benefits is objectionable. Under those principles we find, contrary to our dissenting colleague, that the wage increase was not objectionable.

To determine if a grant of benefits is objectionable, the Board examines the size of the benefit conferred, the number of employees receiving it, the timing of the benefit, and how employees reasonably would view the purpose of the benefit. *Star, Inc.*, 337 NLRB 962, 962 (2002); *B&D Plastics, Inc.*, 302 NLRB 245 (1991). "The Board will infer that an announcement or grant of benefits during the critical period is coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the benefit." *Star*, supra, slip op. at 1.

In the present case, the grant of benefit occurred during the critical period and thus raises an inference of coercive conduct. For the reasons set forth below, however, we find that the Employer has rebutted this inference by "establishing an explanation other than the pending election" for the timing of the wage increase.

Significantly, the wage increase at issue is consistent with the Employer's past practice. In fact, every year since 1994, the Employer granted its employees a unit-wide wage increase. Although the amount of the increase varied slightly from year to year, it was always within the range of 25 to 50 cents an hour. Furthermore, and consistent with this practice, the Employer proposed a 50-cent wage increase to the Union during the parties' 2000 negotiations.[6]

The timing of the increase is also consistent with past practice. Employees' wage increases for 1994 through

[4] Our decision here is consistent with the principle that even the dismissal of an unfair labor practice charge does not require the pro forma overruling of an objection based on the same conduct. See *ADIA Personnel Services*, 322 NLRB 994 fn. 2 (1997).

[5] In addition, *Mike O'Connor* involved an initial representation election. The Board has declined to extend the *Mike O'Connor* "act at your own peril" rule to decertification cases. See *W.A. Krueger Co.*, 299 NLRB 914, 915 (1990). In *Krueger*, the Board held that where a union loses a decertification election, the employer violates Sec. 8(a)(5) by making unilateral changes while the union's objections to the election are pending and before the certification of results issues. See Id. Like *Mike O'Connor*, however, *Krueger* involved allegations that an employer violated Sec. 8(a)(5). As with *Mike O'Connor*, we have found no prior decisions applying *Krueger* in a representation case, like this one, in which no 8(a)(5) violation is at issue.

Chairman Battista does not necessarily agree with the holding of *Krueger* (a unilateral change after a union loss of a decertification election is unlawful under Sec. 8(a)(5), even if the loss is thereafter certified as valid).

To the extent our dissenting colleague relies on *Krueger* and suggests that the wage increase could be found objectionable because it was granted without giving the Union notice and opportunity to bargain, the gravamen of his finding is that the wage increase violated Sec. 8(a)(5). Contrary to our colleague, and for the reasons stated in our discussion of Objection 5 below, we view such a finding as contrary to *Texas Meat Packers*, 130 NLRB 279, 279–280 (1961).

[6] In arguing that the Employer's wage increase was inconsistent with its past practice, our dissenting colleague focuses on the fact that the amount of the increase (i.e., 50 cents) was twice as large as the amount of the increase given in the prior 2 years, and that it had been 6 years since the wage increase had been 50 cents. Contrary to our colleague, we find that the Employer's practice is shown not by focusing on 1 or 2 particular years or on particular amounts, but rather by considering the overall pattern and range over the longer period of several years. We find that, when considered in the context of the overall pattern and range over this longer period, the wage increase at issue is clearly consistent with the Employer's past practice.

1999 all took effect in the month of October, even though, like the wage increase at issue here, they were not necessarily announced in October. In addition, the Employer announced the wage increase in March (retroactive to the prior October), but the second election did not take place until August. Therefore, the wage increase was not close in time to the election.

The wage increase was given to all unit employees. We do not find this factor significant, however, because it is consistent with the Employer's past practice of unit-wide wage increases.

Finally, given the Employer's past practice, the long period of time between the wage increase and the second election, and the fact that the wage increase was the same amount proposed to the Union, we find that employees would not reasonably view the purpose of the wage increase as an attempt to influence their votes in the decertification election.

Therefore, we find that the Employer has successfully rebutted the inference that the wage increase was coercive by showing that past practice explains the timing and amount of the wage increase.

In finding the wage increase objectionable, our dissenting colleague relies heavily on campaign literature distributed by the Employer on April 27 and July 5. He finds that this literature would lead employees to view the wage increase as an attempt to dissuade them from voting for the Union. In particular, he notes that the literature stated that the Union was attempting to take away the wage increase. He also argues that the literature calling attention to the wage increase was distributed closer to the election. Contrary to our colleague, we do not find that this literature makes the wage increase objectionable. The literature was distributed well in advance of the election, and the Union had ample opportunity to respond. The Union did respond, distributing its own literature stating that the Employer's president "is lying when he says the union is trying to deprive you of the $.50. The union is demanding that the . . . $.50 be put in your wages." Therefore, neither the timing nor the content of the Employer's literature undermines our conclusion that the wage increase was not objectionable.

Our colleague faults the Employer for referring to the wage increase as the "fruit" of the first election (which was lost by the Union). However, it was the "fruit" only in the sense that the Employer thought that, with the Union loss, the Employer could act unilaterally. Although that may have been wrong under current Board law, i.e., a violation of Section 8(a)(5), the Board cannot consider that unfair labor practice matter in the representation case. Accordingly, we overrule Objection 1.[7]

C. Objection 5: Failing to Recognize the Union as the Exclusive Bargaining Representative

After the first decertification election in December 2000, the Employer stopped bargaining with the Union, relying on the election results as evidence that the Union lacked majority support. Objection 5 alleges that the Employer interfered with the second election by failing to recognize the Union as the exclusive bargaining representative. The judge sustained this objection. In doing so, he relied in part on the unilateral 50-cent raise in March. He also relied on the Employer's refusal to recognize and bargain with the Union after the first election.

We reverse. The gravamen of the Union's objection is that the Employer violated Section 8(a)(5) by failing to recognize and bargain with the Union. The Board has refused to consider election objections where the gravamen of the objection is an unfair labor practice, and sustaining the objection would require a finding that the alleged objectionable conduct violated the Act. See *Texas Meat Packers*, 130 NLRB 279, 279–280 (1961).

In *Texas Meat Packers*, the Union alleged that the employer interfered with the election by discriminatorily laying off union supporters before the election. The Board found that the "gravamen of this contention" was that the employer violated Section 8(a)(3). That is, whether the layoffs interfered with free choice depended on whether they were discriminatorily motivated, and therefore depended on whether they violated Section 8(a)(3). Therefore, because there were no 8(a)(3) charges before it, the Board found that the alleged discriminatory layoffs could not be considered as a basis for setting aside the election. Id. at 279–280. Specifically, the Board stated:

> It is Board practice to set aside elections because of substantial interference therewith arising from conduct which, in an unfair labor practice proceeding, would also be held violative of the Act. But, in such cases, the interference with the election is found to exist without regard to whether the interfering conduct would be deemed an unfair labor practice in a complaint case.

[7] Member Schaumber notes that the Employer's campaign literature is the subject of a separate objection (Objection 2, discussed in sec. II,D, below). Specifically, the Union alleged that the Employer interfered with the election by stating in campaign literature that the Union had filed charges to "take away" the wage increase. We overrule that objection below, based on Board precedent holding that elections will not be set aside on the basis of misleading campaign statements. See sec. II,D. For this additional reason, Member Schaumber finds that the Employer's campaign literature does not provide a basis for sustaining Objection 1.

> For the effect of preelection conduct on an election is not tested by the same criteria as conduct alleged by a complaint to violate the Act. *On the other hand, where . . . the conduct which is alleged to have interfered with an election could only be held to be such interference upon an initial finding that an unfair labor practice was committed, it is Board policy . . . not to inquire into such matters in the guise of considering objections to an election.* In such cases, the election process may be protected by the timely filing of charges with respect to the conduct in question.

Id. at 280 (emphasis added).[8] Although the gravamen of the objection in *Texas Meat Packers* was an 8(a)(3) violation, the rationale of *Texas Meat Packers* has also been applied in cases, like this one, in which the gravamen of the allegation is an 8(a)(5) violation.[9]

In the present case, the judge found that the Employer's refusal to recognize and bargain with the Union after the first election was objectionable. The refusal to recognize and bargain would tend to interfere with the election, however, only if it violated Section 8(a)(5). Because there are no unfair labor practice charges before us, we are precluded from considering whether the Employer's conduct violated Section 8(a)(5).

Moreover, the judge relied heavily on the Employer's unilateral wage increase as evidence supporting Objection 5. We have found above, however, that the wage increase was not objectionable. Therefore, it cannot provide a basis for sustaining Objection 5. Accordingly, we reverse the judge and overrule Objection 5.

D. Objection 2: Telling Employees the Union Filed Charges to Take Away Their Wage Increase

As explained above, in April 2001, the Union filed unfair labor practice charges alleging that the 50-cent wage increase violated Section 8(a)(1). In campaign literature, the Employer stated that the Union's charge would result in employees losing the wage increase, and characterized the charge as an "attempt[ ] to take away" the increase. Objection 2 alleges that the Employer interfered with the election by telling employees that the Union had filed charges to take away the wage increase.

The judge sustained the objection. He reasoned that the Employer's statements were incorrect, because if a wage increase is found unlawful, the Board does not order rescission of the increase unless the union requests it. The judge acknowledged that under well-established precedent, the Board does not set aside elections on the basis of false or misleading campaign statements. See *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982). Nevertheless, the judge relied on the principle that "Board intervention will continue to occur in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes . . . ." *Shopping Kart Food Market*, 228 NLRB 1311, 1313 (1977). The judge found that the Employer's statements "improperly involved the Board and its processes," because the Employer misstated the remedy the Board would order if it found the wage increase unlawful.

We reverse. The Board clearly stated in *Midland* that it will not "probe into the truth or falsity of the parties' campaign statements" and "will not set elections aside on the basis of misleading campaign statements." 263 NLRB at 133. Further, we do not agree that the Employer's campaign propaganda "improperly involv[ed] the Board and its processes." At most, the Employer misstated Board law and possible future Board action. Mere misstatements of law or Board actions are not objectionable under *Midland*. See, e.g., *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988) ("the mere fact that a party makes an untrue statement, whether of law or fact, is not grounds for setting aside an election"); *Blue Grass Industries*, 287 NLRB 274, 276 (1987) (employer erroneously stated that Board law prevented him from debating with the union; statement was not objectionable because "mischaracterizations of Board actions are viewed the same as other misrepresentations that we find nonobjectionable"); *Riveredge Hospital*, 264 NLRB 1094, 1095 (1982) (leaflet erroneously stating that the Board had issued a complaint against the employer was not objectionable; "we see no sound reason why misrepresentations of Board actions should be on their face objectionable or be treated differently than other misrepresentations") (footnote omitted). Under *Midland*, therefore, we overrule Objection 2.

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[8] As explained in sec. II,B,1, above, the failure to file an unfair labor practice charge regarding preelection conduct, or the withdrawal of such a charge, does not constitute a waiver of the party's right to allege that the conduct was objectionable. Even if there are no unfair labor practice charges, the Board can still find the conduct objectionable, *unless* it is the type of conduct addressed in *Texas Meat Packers*: conduct that can only be held to interfere with the election upon an initial finding that an unfair labor practice was committed.

[9] See *National League of Professional Baseball Clubs*, 330 NLRB 670, 677 (2000) (because no unfair labor practice allegations were before him, hearing officer declined to analyze whether alleged unilateral changes were objectionable conduct, except to the extent that those changes expressed support for one union or disparaged another); *Fibreboard Corp.*, 283 NLRB 1093, 1100 (1987) (because no 8(a)(5) violation was alleged, judge rejected union's argument that unilateral elimination of jobs precluded employer from challenging those employees' election ballots; "[a]bsent any contention in the unfair labor practice proceeding that Respondent's elimination of various jobs was violative of the Act, such job elimination must be presumed to be lawful").

E. Objection 4: Alleged Captive Audience Speech Within 24 Hours Before Election

Objection 4 alleges that the Employer interfered with the election by sending a brief electronic "Vote No" message, within 24 hours before the election, to the "mobile data units" (MDUs) in employees' trucks. An MDU consists of a modem box and a 2-by-4 inch screen mounted on the truck's dashboard. The Employer used the MDU system to send text messages to its drivers, including the preelection message at issue here.

The judge found that the Employer's message violated the rule in *Peerless Plywood*, 107 NLRB 427, 429 (1953), which prohibits 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." In addition to election speeches to "massed assemblies of employees," the Board has found that prolonged sound truck broadcasts of speeches and partisan songs are objectionable under *Peerless*, where the broadcasts were heard in the plant by employees at work. See *Purolite*, 330 NLRB 37, 39–40 (1999); *United States Gypsum Co.*, 115 NLRB 734, 734–735 (1956) (emphasizing that although the employees subjected to the broadcast were not in a "massed assembly," they "were not isolated, but were working with or near each other"). Relying on the sound truck cases, the judge found that the Employer's message violated *Peerless Plywood* because the message was uninvited. He found that although drivers could delete the message or scroll past it, in doing so they would see it, and therefore the Employer would succeed in communicating its message. Therefore, the judge found that the drivers became a captive audience under *Peerless*.

We disagree. In *Peerless*, the Board clarified that its rule prohibiting captive audience speeches did not prohibit circulating campaign literature or "any other legitimate campaign propaganda or media." 107 NLRB at 430; see also *Pearson Education, Inc.*, 336 NLRB 979, 979 (2001) ("The *Peerless Plywood* rule . . . does not apply to posters or other campaign literature."). Considering the particular characteristics of the Employer's message, we find that it is more analogous to campaign literature than to a campaign speech or sound truck broadcast. The message was not audible. Although it was uninvited, the drivers could delete or scroll past it if they chose; they did not have to leave it on the screen indefinitely. We do not find it persuasive that employees would necessarily be exposed to the message in the process of deleting or scrolling past it. The same can be said of campaign posters, to which *Peerless* does not apply. Moreover, the Employer sent its message to employees in their trucks. The message was not delivered to "massed assemblies of employees," as in *Peerless*, or even to employees "working with or near each other," as in *United States Gypsum*. Therefore, we overrule Objection 4.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Brotherhood of Teamsters, Local Union 639, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER WALSH, dissenting in part.

I join my colleagues in overruling *Ellicott Machine Corp.*, 54 NLRB 732 (1944).[1] I disagree, however, with their overruling of Objection 1, which alleges that the Employer interfered with the election by unilaterally granting a 50-cent wage increase. I would sustain this objection and order a third election. I would find it unnecessary to pass on the Union's other objections.

My colleagues analyze the Employer's unilateral wage increase under Board law governing preelection grants of benefits. I am hesitant to apply the grant of benefit cases here. The "general rule" of the Board's leading grant of benefit case is that an employer, "in deciding whether to grant benefits while a representation election is pending, should decide that question as he would if a union were not in the picture." *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29 fn. 1 (1967) (*A & P*), enfd. in part, remanded in part 409 F.2d 296 (5th Cir. 1969). That rule applies well in an initial representation election situation where there is no incumbent union. However, it does not neatly fit the facts of this case, in which the Employer unilaterally granted a wage increase while objections to a decertification election were pending. At that time, the Employer was under a statutory duty to bargain with the Union before making changes in terms and conditions of employment and therefore could not legally act "as he would if a union were not in the picture."

Nevertheless, even applying *A & P* and its progeny, I would find that the wage increase in the present case was an objectionable grant of benefits. To determine if a grant of benefits is objectionable, the Board examines the size of the benefit conferred, the number of employees receiving it, the timing of the benefit, and how employees reasonably would view the purpose of the benefit. *Star, Inc.*, 337 NLRB 962, 962 (2002); *B&D Plastics, Inc.*, 302 NLRB 245 (1991). "The Board will infer that an announcement or grant of benefits during the critical period is coercive, but the employer may rebut the inference by establishing an explanation other than the pend-

[1] I also join them in denying the Employer's request for a hearing de novo.

ing election for the timing of the announcement or the bestowal of the benefit." *Star*, supra, slip op. at 1.

Under this standard, I agree with my colleagues that an inference is warranted that the wage increase was coercive. The wage increase was granted during the critical period, and that alone is sufficient to raise an inference of coercive conduct. Other factors reinforce that inference.

First, the amount of the wage increase was twice as large as the increases given during the past 2 years. The record shows only one prior 50-cent increase, which was given in 1994, 6 years earlier.[2]

Second, although the March 2001 wage increase at issue here was announced several months before the election, the Employer called attention to it in campaign literature distributed closer to the election.

Third, all unit employees received the wage increase.

Finally, employees would reasonably view the purpose of the raise as an attempt to dissuade them from supporting the Union, because the Employer repeatedly linked the raise to the Union and the ongoing decertification proceedings. Specifically, when it announced the raise, the Employer "predicted the union would fight to prevent you from getting this money." Later, in a letter to employees, the Employer noted that 3 months had passed since the decertification election, and that the Union's objections were now before the Board. The Employer emphasized that the Union had filed charges to "take away" the wage increase, and asked:

> Why would you want a representative who files legal actions *to take away your pay increase*? It is certain the union will use every possible legal maneuver to prevent you from enjoying the fruits of your free choice in the election.

That is, the Employer suggested that the raise was a "fruit" of the first decertification election, which the Union lost.[3] Furthermore, on July 5, 2001, the Employer distributed another memorandum to employees, notifying them that the Board had ordered a second election. The memorandum urged employees to vote no, and then reminded employees of the 50-cent raise, stating that the Employer was "continuing to fight on your behalf to keep" the pay raise, but the Union was "still arguing" that the pay raise should be taken away. Considering the Employer's statements, employees would reasonably view the purpose of the raise as an attempt to dissuade them from supporting the Union.[4] For all these reasons, I would find that an inference is warranted that the pay raise was coercive.

Contrary to my colleagues, I would find that the Employer has not rebutted that inference. First, although the Employer had a past practice of wage increases that took effect in October, there does not appear to be a consistent past practice regarding when these raises were announced. Second, the Employer's explanation at the hearing for announcing the raise in March 2001 was that it did not want employees to wait any longer for a raise, and it considered the Union decertified, based on the December 2000 election results. The Employer knew in March 2001, however, that objections were pending and the election results were not final. Third, the Employer's own statements about the raise, discussed above, undermine its position that the raise was not granted to influence the election.

Accordingly, I would sustain Objection 1 and order a third election.[5]

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[2] My colleagues focus on the "overall pattern and range" of raises over the last 6 years, from 1994 through 1999. Because these past raises were within the range of 25 to 50 cents, my colleagues do not find it significant that employees had not received a 50-cent raise since 1994. However, the "overall pattern and range" of the raises shows that from 1994 through 1999, the amount of the annual raise decreased almost every year—from 50 cents in 1994 to 25 cents in 1998 and 1999. In 2000, the year at issue here, the raise not only increased, but doubled.

[3] My colleagues state that the raise was a "fruit" of the election only in the sense that the Employer thought it could act unilaterally, because the Union had lost the election. Even under this view, I do not agree that the raise was unobjectionable.

My colleagues appear to concede that under Board law, the Employer's position that it could act unilaterally was incorrect, and (if an 8(a)(5) charge had been filed) the raise may have been found unlawful. Nevertheless, my colleagues conclude that the Board cannot consider this issue in the present representation case, because there is no 8(a)(5) charge before us.

I agree that the sole issue before the Board is whether the Employer engaged in objectionable conduct that interfered with the election, and that the Board cannot find that the raise violated Sec. 8(a)(5). In my view, however, in a decertification context, the absence of an 8(a)(5) finding does not necessarily preclude the Board from finding that a unilateral wage increase, granted in denigration of an incumbent union while the union's objections are pending, interfered with the election. See fn. 5, below.

[4] Contrary to my colleagues, I do not find it persuasive that the Union had the opportunity to respond to the Employer's literature. Whatever the Union could have said, or did say, about the raise, the fact remains that the Employer granted a raise twice as large as in recent years and connected that raise to the decertification proceedings.

[5] In addition to arguing that the wage increase was not an objectionable grant of benefits, the Employer also argues that this objection should be overruled under *Texas Meat Packers*, 130 NLRB 279 (1961). The Employer argues that the nature of the objectionable conduct alleged by the Union and found by the judge—a unilateral change in wages—requires a finding that the Employer violated Sec. 8(a)(5), and there are no 8(a)(5) charges before the Board.

I have doubts whether *Texas Meat Packers* should apply here. In *Texas Meat Packers*, the Board held that where conduct alleged to have interfered with an election "could only be held to be such interference upon an initial finding that an unfair labor practice was committed, it is Board policy . . . not to inquire into such matters in the guise of considering objections to an election." 130 NLRB at 280. The Board also

Thomas P. McCarthy, Esq., for the Regional Director, Region 5.

John G. Kruchko, Esq. (*Kruchko & Fries*), of McLean, Virginia, for the Employer.

Hugh J. Beins, Esq., of Washington, D.C., for the Union.

SUPPLEMENTAL REPORT ON OBJECTIONS

DECISION ON REMAND

MARION C. LADWIG, Administrative Law Judge. On June 26, 2002, the Board remanded this proceeding for me to consider the Employer's posthearing brief, which was timely delivered to the Board's mailroom, but which I did not receive before issuing my April 30, 2002 Report on Objections Decision. After considering the Employer's posthearing brief, I issue the following supplemental report.

STATEMENT OF THE CASE

On July 2, 2001,[1] in this union decertification case, the Board issued a Decision and Direction of Second Election, which was conducted on August 15. Of about 213 eligible voters, 81 cast ballots for and 97 cast ballots against the Union. There were five challenged ballots, an insufficient number to affect the results of this second election. (Br. Exh. 1D.) On August 21 the Union filed timely objections to the Employer's preelection conduct (Br. Exh. 1A). The hearing on objections was held February 27, 2002.

The first election had been conducted December 20, 2000 (Br. Exh. 1B), following the September 30, 2000 expiration of the Union's last agreement with the Employer (Tr. 11; U. Exh. 14). While union objections to the Employer's conduct before that first election were pending, the Employer withdrew recognition from the Union and refused to bargain.

Thus, sometime after the Union lost the first election by a vote of 78 to 86 (Br. Exh. 1B), Operations Vice President Stephen Render informed the union steward that they considered the election over, that the Union was decertified, and that the Employer was not going to recognize the Union (Tr. 84). When testifying, Render did not deny doing so. On February 14, the Employer's counsel notified the Union's counsel that a majority of the employees rejected representation by the Union and we "respectfully decline your invitation for collective bargaining negotiations until such time as your union establishes the requisite majority support" (U. Exh. 2).

In March the Employer unilaterally granted the employees a 50-cents-an-hour wage increase, retroactive to October 1, 2000 (Tr. 107).

On April 10, the Union filed an unfair labor practice charge in Case 5–CA–29652 against the Employer (U. Exh. 13), alleging the Employer's unlawful "granting the employees a 50¢ an hour wage increase on or about March 2000." In the Employer's response, President Diggs Bishop on April 27 sent the employees a letter (U. Exh. 3), "Re. Teamsters Union Files Charges to Take Away Your Pay RAISE."

In the April 27 letter, Bishop warned the employees with loss of the "*50¢ an hour increase* retroactive to October" if the Union prevailed, falsely telling them that the "the union's Unfair Labor Practice charge would result in all employees *losing this pay increase*." [Emphases in original.]

Bishop then stated in the letter:

> [I]t is our intention to fight this action by the union as aggressively as possible and for as long as it takes. You must ask yourself the question, "Why would I want an *exclusive* bargaining representative who is attempting to take away my pay raise?. . . . Why would you want a representative who files legal actions *to take away your pay increase*?" [Emphases in original.]

On July 5, 3 days after the Board set aside the first election and directed a second election, Bishop sent the employees a memo (U. Exh. 4) regarding the decertification vote. Referring to "your 50¢ per hour pay raise," he claimed "we are continuing to fight on your behalf to keep the money" and falsely stated:

> The Union, however, is still arguing to the Government that the *pay raise should be taken away from you.* [Emphasis added.]

President Bishop admitted on direct examination (Tr. 110) that the Union responded in a pamphlet mailed to the employees ("Attention Virginia Concrete Employees," Emp. Exh. 2, "Mailed to home 7/27/01"):

> Bishop is *lying* when he says that the union is trying to deprive you of the 50 cents. [Emphasis added.]

As shown in attachment B to the Employer's brief, the Union filed a charge in Case 5–CA–29854 on July 17, alleging the Employer's unlawful "threatening that the Union is trying to take away their 50¢ an hour wage increase."

On August 14, within the 24-hour period before the second election, the Employer sent all 174 of its drivers on duty the following 7-minute, uninvited four-line campaign message, which was displayed on the 2-by-4 inch screen of the Mobile

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stated, however, that "only a very small minority of objections in representation cases are of the type here involved, i.e., conduct innocent on its face and which can only be shown to have interfered with an election by an initial finding that an unfair labor practice has been committed." Id. at 281 fn. 2. In *Texas Meat Packers*, the gravamen of the union's objection was that prounion employees were discriminatorily laid off before the election in violation of Sec. 8(a)(3). Arguably, *Texas Meat Packers* should apply only in other, similar cases turning on employer motive, because those cases do involve "conduct innocent on its face." That is, only by looking behind the conduct itself and finding an unlawful motive can the Board find that the conduct interfered with the election. I am not aware of any decision applying *Texas Meat Packers* to a unilateral grant of benefits in a decertification context. I do not think that a grant of benefits, given in total denigration of an incumbent union while the union's objections are pending, is conduct "innocent on its face" under *Texas Meat Packers*. See *W. A. Krueger Co.*, 299 NLRB 914, 916–917 (1990) (in a decertification context, an election-day tally that is subject to objections does not relieve employer of its preexisting bargaining obligations; allowing employer to make unilateral changes at its peril while objections are pending "would have the same tendency to undermine an incumbent union's future effectiveness and status in employees' eyes as bypassing the bargaining representative under other circumstances"). Therefore, I question the applicability of *Texas Meat Packers* here.

[1] All dates are in 2001 unless otherwise indicated.

Data Unit (MDU) modem box mounted above the dashboard on each of the mixer trucks they were driving:

YOUR VOTE COUNTS
IT'S YOUR FUTURE
BRING IT TO AN END
VOTE NO

The issues are whether objections to the above and other employer preelection conduct must be sustained, the second election set aside, and a third election directed.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Union, I find as follows.

Objections 1 and 5

A. Original Findings

As grounds for setting aside the second election, the Union's Objection 1 cites the Employer's "Ignoring and bypassing the Union in granting a 50¢ an hour raise," and its Objection 5 cites the Employer's "Failing and refusing to recognize the Union's status as exclusive bargaining representative" (Br. Exh. 1A).

As held in *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974):

> The Board has long held that, absent compelling economic considerations for doing so, an employer acts *at its peril* in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. [Emphasis added; footnotes omitted.]

In that case the employer defended its unilateral changes on the ground that they "were motivated by *sound business considerations*." (Emphasis added.) The Board rejected the employer's objections to the election and held (209 NLRB at 704):

> It is well established, however, that *whether unlawfully motivated or not*, an employer violates Section 8(a)(5) and (1) where it makes changes in terms and conditions of employment during the pendency of objections to an election which eventually results in the certification of the union. [Emphasis added.]

This often-cited *Mike O'Connor* rule is followed both when the union wins a representation RC election and the employer files objections that are rejected, and when the union loses a decertification RD election and the union files objections that are sustained.

In *Dow Chemical Co. v. NLRB*, 660 F.2d 637, 654 (5th Cir. 1981), the court ruled:

> Under what we also call the *Mike O'Connor* rule, an employer may make unilateral changes following a union victory in an initial representation election and before the employer's election objections are resolved, but does so *at its peril* [emphasis in original]. If the employer's objections are sustained, no duty to bargain with the union existed and a failure to bargain charge under § 8(a)(5) will be dismissed. . . . . If the employer's objections are rejected, its duty to bargain relates back to the date of the election, and the employer's unilateral actions while objections were pending are automatic violations of § 8(a)(5). . . .
>
> Though *Mike O'Connor* involved an initial representation election won by the union, and the present case involves a decertification election lost by the union, we see no basis in law or justice for distinguishing between types of election or distinguishing on a basis of which side won or lost. Moreover, we view the Act as requiring that its labor peace goals, as well as protection of workers' freedom to choose, be achieved by an even-handed application of the same rules of the game to all elections and to both sides.

The Board in *Underground Service Alert*, 315 NLRB 958, 959, 960 fn. 5, 961 (1994), applied the *Mike O'Connor* at-its-peril rule governing changes during the period between balloting and certification in a decertification election "that ultimately resulted in the certification of the Union."

In *Underground Service*, a Board majority did not rely on *W. A. Krueger*, 299 NLRB 914, 915 (1990). In that earlier case, another Board majority "declined to extend the *Mike O'Connor* 'at risk' rule to decertification situations" in elections that do *not* result in certification of the union. The Board majority in *Underground Service* pointed out (315 NLRB at 961 fn. 8):

> In that case [*W. A. Krueger*], the union was ultimately declared the loser of the election. In the instant case [*Underground Service*], the union was ultimately declared the winner.

Before the hearing on objections in the present case [see the Regional Director's February 1, 2002 Supplemental Decision and Notice of Hearing] (Board Exh. 1D p. 2), the Employer's defenses to Objection 1 ("Ignoring and bypassing the Union in granting a 50¢ an hour raise") were as follows:

> The Employer concedes granting the [50¢] wage increase but contends that it was granted in conformance with past practice, that refusing to grant the wage increase would have constituted objectionable conduct, and that the wage increase did not interfere with employees free choice in the election.

Also before the hearing (Board Exh. 1D p. 3), the Employer's defense to Objection 5 ("Failing and refusing to recognize the Union's status as exclusive bargaining representative") was a general denial that "The Employer denies having engaged in objectionable conduct."

At the hearing on objections, President Diggs Bishop testified, on direct examination in the Employer's defense (Tr. 107–108):

> Q. (By Mr. Kruchko): Why did you grant the increase in March [2001] that ended up being retroactive to October 1st?
>
> A. Well, we didn't feel that we could have the employees wait any longer. We had had a vote. The union was decertified. We had seen the objections and didn't feel that any of them were warranted, and we didn't think

> it was fair to have the employees wait any longer. We didn't know how long it was going to take to have a decision.

On cross-examination (Tr. 124–126), Bishop testified that he refused to recognize and bargain with the Union because it lost the (December 20, 2000) vote, that he believed the election would be certified, but that regardless whether the Union's objections were good or bad, he would not have recognized and bargain with the Union because "It lost the vote."

Regarding the Employer's prehearing defense that the 50-cent wage increase "was granted in conformance with past practice," Bishop testified (Tr. 105) that when the Employer reached an agreement with the Union in 1998, there was a retroactive increase of 30 cents to October 1996 and 35 cents to October 1997 and a negotiated increase of 25 cents in October 1998 and [25] cents in 1999. Therefore there was no past practice of granting an annual wage increase in recent years and only a single instance of granting retroactive increases, which were negotiated with the Union, in the amounts of 30 and 35 cents. The only grant of a retroactive 50-cent increase was in March 2001, when objections to the first decertification election were pending.

Thus, the Employer's defenses—in the absence of any contentions or arguments in a brief—completely ignore the Board's *Mike O'Connor* rule that an employer acts "at its peril" if it makes unilateral changes before the election objections are resolved.

I find that by granting the unilateral 50-cent wage increase while objections to the first election were pending, the Employer acted at its peril that doing so would be illegal if the decertification election "ultimately resulted in the certification of the Union." Moreover, I find that by taking this unilateral action, before a determination of its right to do so (was) determined, the Employer interfered with the second election.

Under these circumstances, I find that Objections 1 and 5 should be sustained, because the Employer's conduct deprived the employees of a free and fair choice in the election, requiring the August 15 second election to be set aside.

B. Employer Contentions

1. Objection 1

a. Objection based on withdrawn charge

On considering the Employer's brief (pursuant to the Board's remand of this proceeding for me "to consider the Employer's posthearing brief and issue a supplemental report"), I find that the Employer has, in fact, completely ignored the Board's well-established and court-approved *Mike O'Connor* at-its-peril rule. That rule has been the controlling standard in decertification cases for making changes in conditions of employment during the period that objections to an election are pending, as in the above-cited *Dow Chemical* and *Underground Service* decertification cases.

In the Employer's March 25, 2002 posthearing brief (at 3), under Argument, the Employer's No. 1 contention is that an unfair labor practice charge that has been withdrawn may not be the basis for an election objection.

To support this contention, the Employer cites in the brief (at 3) the Board's Wagner Act decision, *Ellicott Machine Corp*., 54 NLRB 732, 735 (1944), which has never been cited by the Board in the 58 years since that case was decided. There the Board held:

> [W]e are of the opinion that a labor organization which has filed a petition seeking a certification of representatives and which has also filed charges of unfair labor practices against an employer, should not be permitted to proceed on the petition after withdrawing its charges without prejudice, and then, in the event it loses at a subsequent election, be permitted to use the subject matter of the charges as objections to the election. Accordingly, in the instant case and in future cases where charges are withdrawn without prejudice to facilitate the determination of a representation proceeding, we shall treat the withdrawal of the charges without prejudice as an automatic waiver by the petitioning union of the right to use the subject matter of those charges as a basis for objections to the election.

In the absence of any subsequent decision in which the Board cited *Ellicott Machine*, the Employer cites in its brief (at 3) *Redway Carriers*, 274 NLRB 1359, 1367–1368 (1985), a case in which no exception was taken to the administrative law judge finding related to *Ellicott Machine*. It is well established that a judge's finding, to which no exception is taken, is not considered precedent for any other case because of the Board's practice of adopting, as a matter of course, a judge's findings to which no exceptions are taken. *Watsonville Register-Pajaronian*, 327 NLRB 957, 959 fn. 4 (1999).

Nevertheless, the Employer cites the judge's finding in *Redway Carriers* as precedent in the present case. It also cites in its brief (at 3–4) *Taste Baking Co*., Case 4–CA–23640 (1996), a case which was never before the Board—no exceptions having been filed to the judge's decision—and in which the judge relied on the judge's finding in *Redway Carriers* as precedent. Both cases are obviously inapplicable.

The Employer does not cite any Board decision, ruling that withdrawing a preelection charge nullifies the *Mike O'Connor* at-its-peril rule that governs changes in conditions of employment during the pendency of objections to an election which eventually results in the certification of the union.

Such a ruling would prevent a final determination in any case in which an employer engaged in conduct depriving the employees of a free and fair choice in an election, if there was a preelection withdrawal of a charge, alleging that the employer's conduct was unlawful.

I find that the Board's 1944 *Ellicott Machine* decision does not nullify the *Mike O'Connor* at-its-peril rule as the controlling standard in this decertification case.

Moreover, in the present case, there was no preelection withdrawal of the Union's April 10 unfair labor practice charge in Case 5–CA–29652 (U. Exh. 13), alleging unlawful granting of the 50-cent increase in March (when objections to the first election on December 20, 2000 were still pending). The second election was conducted on August 15, *without* the preelection withdrawal of the April 10 charge. As shown in attachment A

to the Employer's brief, that charge was not withdrawn until February 5, 2002, nearly 6 months later.

I find that the Union's April 10 charge, which was withdrawn on February 5, 2002, about 6 months *after* the second election was conducted on August 15, does not preclude a finding that the Employer's granting the 50-cent wage increase deprived the employees of a free and fair choice in the second election.

b. No interference with employee choice

In its brief (at 4), the Employer next contends that the 50-cent raise did not interfere with the election or employee choice.

To the contrary, obviously the Employer's granting the 50-cent wage increase—particularly in the context of the Employer's accompanying conduct—interfered with the employees' free and fair choice in the August 15 election.

As found, the Employer engaged in the following conduct, in response to the Union's April 10 unfair labor practice charge, alleging unlawful granting of the 50-cent wage increase:

> 1. On April 27 the Employer sent the employees a letter, "Re. Teamsters Union Files Charges to Take Away Your Pay RAISE."
>
> 2. In the letter, the Employer warned the employees with loss of the "*50¢ an hour increase* retroactive to October" if the Union prevailed, falsely telling them that "the union's Unfair Labor Practice charge would result in all employees *losing this pay increase*." [Emphases in original.]
>
> 3. Also in the letter, the Employer stated: "You must ask yourself the question, 'Why would I want an *exclusive* bargaining representative who is attempting to take away my pay raise?. . . . Why would you want a representative who files legal actions *to take away your pay increase*?'" [Emphases in original.]
>
> 4. In a July 5 memo (3 days after the Board set aside the first election and directed a second election), the Employer falsely stated, "The union . . . is still arguing to the Government that the pay raise should be taken away from you."

Obviously, the Employer was intentionally endeavoring to persuade the employees that a vote for the Union would jeopardize their retroactive wage increase.

Although the Union mailed the employees a pamphlet on July 27 (before the August 15 second election), stating that President Bishop "is lying when he says that the union is trying to deprive you of the 50 cents," undoubtedly the Employer's false and misleading conduct had an impact on the employees' choice in the election.

In its brief, the Employer not only completely ignores this conduct, but also continues to ignore the *Mike O'Connor* at-its-peril rule governing making changes in conditions of employment during pendency of objections.

In *Mike O'Connor*, 209 NLRB 701, 703–704 (1974), as discussed above, the Board held that "absent *compelling economic considerations* [emphasis added] for doing so, an employer acts at is peril in making" the changes in conditions of employment. The Board rejected the employer's defense that the changes "were *motivated by sound business considerations* [emphasis added]" and held:

> It is well established . . . that, *whether unlawfully motivated or not*, an employer violates Section 8(a)(5) and (1) where it makes changes in terms and conditions of employment during the pendency of objections to an election which eventually results in the certification of the union. [Emphasis added.]

Nowhere in the many arguments advanced by the Employer in its brief (at 3–10), has the Employer cited any evidence of "compelling economic considerations" for the Employer's granting the retroactive 50-cent wage increase during the pendency of the objections.

I specifically reject the Employer's contention in its brief (at 6) that "First, and perhaps most importantly, Virginia Concrete was simply acting in accordance with its regular business practice of implementing its *yearly raise every October*." (Emphasis added.)

To the contrary, as indicated above in my original findings, President Bishop testified (Tr. 105), there was *no* yearly raise in 1996 or 1997. In March 1998—about 2-1/2 years since the employees last received a wage increase in October 1995—the Employer negotiated a *30-cent* increase retroactive to October 1996 and a *35-cents* retroactive to October 1997. The October increase was *25 cents* in 1998 the *25 cents* again in 1999.

In negotiations in 2000—*after* the decertification petition was filed on July 25, 2000 (Board Exh. 1B p. 2 fn. 3) and before the upcoming election on December 20, 2000—the Employer offered a 50-cent increase, twice as much as in the two preceding years. As indicated, there have been no negotiations after the first election.

After considering the Employer's posthearing brief, I find that Objection 1 should be sustained, because the Employer's granting the 50-cent increase during the pendency of objections to the first election deprived the employees of a free and fair choice in the second election.

2. Objection 5

As found, regarding the Employer's "Failing and refusing to recognize the Union's status as exclusive bargaining representative," (a) President Bishop testified that he refused to recognize and bargain with the Union after the first election on December 20, 2000, (b) Operations Vice President Render informed the union steward that the Employer was not going to recognize the Union, and (c) on February 14, 2001, the Employer's counsel notified the Union's counsel that we "respectfully decline your invitation for collective bargaining negotiations until such time as your union establishes the requisite majority support."

Then in March, without any negotiations with the Union, the Employer granted the employees a unilateral 50-cent wage increase, retroactive to October 1, 2000.

In its brief (at 27–29), the Employer contends, in effect, that the Union has failed to prove that the employees were aware of the Employer's failure and refusal to recognize the Union after the first election and has failed to prove "the Employer's failure

to bargain with the Union interfered with the laboratory conditions surrounding the election."

To the contrary, the employees were obviously aware that the Employer was refusing to continue recognizing and bargaining with the Union after the first election, in the following context:

> 1. The Employer's unilateral granting the retroactive 50-cent wage increase.
>
> 2. The Union's charging that the Employer's granting the 50-cent wage increase and "threatening that the Union is trying to take away their 50¢ an hour increase."
>
> 3. The Employer's responding in a letter and memo to the employees that the Union's "Unfair Labor Practice charge would result in all employees *losing this pay increase*, that "Why would you want a representative who files legal actions *to take away your pay increase*?" and that the Union "is still arguing to the Government that the pay increase should be taken away from you."

Undoubtedly the Employer's failure and refusal to recognize the Union after the first election, along with the Employer's well-publicized false and misleading antiunion conduct, had an impact on the employees' choice in the election.

After considering the Employer's posthearing brief, I find that Objection 2 should be sustained, because the Employer's failing and refusing to recognize the Union's status as exclusive bargaining representative during the pendency of objections to the first election deprived the employees of a free and fair choice in the second election.

Objection 2

A. Original Findings

As further grounds for setting aside the second election, the Union's Objection 2 cites the Employer's "Telling the employees that the Union was filing charges in order to take away their 50¢ an hour raise."

Before the hearing, the Employer's defense was as follows [see the Regional Director's February 1, 2002 Supplemental Decision and Notice of Hearing] (Board Exh. 1D p. 2):

> The Employer denies that [its April 27 and July 5] letters constitute objectionable conduct and that, even *assuming arguendo a misrepresentation was made* [emphasis added], it was not deceptive or otherwise misleading.

The Board held in *Shopping Kart Food Market*, 228 NLRB 1311, 1313–1314 (1977):

> [W]e decide today that we will no longer set elections aside on the basis of misleading campaign statements. However, Board intervention will continue . . . in instances where a party has engaged in such *deceptive campaign practices as improperly involving the Board and its processes* [emphasis added] . . . . [W]e choose to . . . [set] an election aside not on the basis of the *substance* of the representation, but the deceptive *manner* in which it was made [emphasis in original].

Five years later, in *Midland National Life Insurance Co.*, 263 NLRB 127, 129 (1982), the Board decided "to return to the sound rule announced in *Shopping Kart Food Market*."

In the present case, the "substance" of the Employer's misleading representation, as alleged in Objection 2, was President Bishop's "Telling the employees that the Union was filing charges to take away their 50¢ an hour raise."

Similarly, Bishop indicated the same substance of his representation both in the title of his April 27 letter to the employees (U. Exh. 3), "Re: Teamsters Union Files Charges to Take Away Your Pay RAISE," and in the statement in his letter, "You must ask yourself the question, 'Why would I want an *exclusive* bargaining representative who is attempting to take away my pay raise??'" Also at the hearing, Bishop admitted that this was the substance of his representation (Tr. 109, 127).

As held in *Shopping Kart*, the Board will no longer set aside an election based on the "substance" of a misleading representation, unless it is made in a deceptive manner, improperly invoking the Board and its processes. The employees are expected to be able to evaluate the representation as mere propaganda, particularly in a case such as this, in which an employer's misleading representation is disputed by the Union.

President Bishop, however, made his misleading representation in such a deceptive manner.

In the text of his April 27 letter, Bishop engaged in the deceptive campaign practice of "improperly involving the Board and its processes." He warned the employees with loss of the "*50¢ an hour increase* retroactive to October" if the Union prevailed, falsely telling them that the "the union's Unfair Labor Practice charge would result in all employees *losing this pay increase*."

Then on July 5, 3 days after the Board set aside the first election and directed a second election, Bishop repeated the same deceptive campaign practice, this time improperly involving "the Government." Bishop sent the employees a memo (U. Exh. 4) regarding the upcoming decertification vote. Referring to "your 50¢ per hour pay raise," he claimed "we are continuing to fight on your behalf to keep the money" and falsely stated:

> The Union, however, is still arguing to the Government that the *pay raise should be taken away from you.* [Emphasis added.]

To the contrary, the Board's well-established practice is not to order the revocation of an unlawfully granted unilateral wage increase, unless requested by the union. *Herman Sausage Co.*, 122 NLRB 168, 175 (1958) and *M. A. Harrison Mfg. Co.*, 253 NLRB 675, 677 (1980).

Obviously the Union, seeking to continue representing the employees, could not be expected to request the Board to revoke the largest retroactive wage increase ever granted by the Employer.

Thus, by improperly involving the Board and its processes in its April 27 letter, and "the Government" in its July 3 memo, the Employer made the misleading representation in a deceptive manner, warning the employees that if the Union proved its charge, the Board would order the Employer to revoke the wage increase. By making the misleading representations in this deceptive manner, the Employer was preventing the employees from evaluating the representation as mere propaganda.

Therefore, when the employees voted in the election, they were faced with the Employer's threat that if Union proved the charge against the Employer, their 50-cent pay increase would be taken away. The Board specifically held in *Midland National Life*, 263 NLRB at 133:

> As was the case in *Shopping Kart*, we will continue to protect against other campaign conduct, such as *threats*, promises, or the like, which interferes with employee free choice. [Emphasis added.]

I find that Objection 2 should be sustained, because the Employer's conduct deprived the employees of a free and fair choice in the election, requiring the August 15 second election to be set aside.

B. Employer Contentions

1. Objection 2

a. Objection based on withdrawn charge

Again in its brief (at 10), the Employer completely ignores the Board's well-established and court-approved *Mike O'Connor* at-its-peril rule, which is the controlling standard in decertification cases for making changes in conditions of employment during the period that objections to an election are pending.

The Employer contends that the pretrial withdrawal of an unfair labor charge in this decertification case, in which objections are pending, prohibits the Union from succeeding on an objection "related to the Employer telling employees that the Union was trying to take away their fifty cent raise."

Without further explanation, the Employer states in its brief (at 10 fn. 14): "For a more detailed discussion of Board law supporting this assertion, please refer" to its discussion of the above-quoted Board's 1944 *Ellicott Machine* decision. As found, that decision does not nullify the *Mike O'Connor* at-its-peril rule as the controlling standard in this decertification case. I find no merit to this contention.

I therefore find that the preelection withdrawal of the Union's July 17 charge in Case 5–CA–295854 (attachments B and C to the Employer's brief), does not preclude a finding that the Employer's "threatening that the Union is trying to take away their 50¢ an hour wage increase" deprived the employees of a free and fair choice in the second election.

b. No interference with employee choice

In its brief (at 11), as its first defense, the Employer points out that President Bishop testified "he believed" that the Union's unfair labor charge "did in fact mean that the Union was trying to take away the fifty cent raise." The Employer then contends that it is "only logical" that Bishop "would believe that the remedy for [the Union's] objection to the granting of a pay increase would be to take that increase away." Thus the Employer implies that Bishop was acting without benefit of counsel.

Clearly, however, Bishop's purported belief is not relevant in determining whether his conduct interfered with the employees' free and fair choice in the election. Moreover, he did not impress me as being a truthful witness when testifying what "he believed." I discredit his testimony about his belief.

The Employer next contends that even assuming arguendo that Bishop "may have unintentionally made a misrepresentation," it would not be objectionable conduct under Board analysis, citing the Board's above-discussed decision, *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). The Employer, however, omits any reference to the Board's deciding in that case (263 NLRB at 129) "to return to the sound rule announced in *Shopping Kart Food Market*," in which the Board held (228 NLRB at 1313), as quoted above, that

> Board intervention will continue to occur in instances where a party has engaged in such deceptive campaign practices as *improperly involving the Board and its processes* [emphasis added].

As originally found, President Bishop made his misleading representation in such a deceptive manner by "improperly involving the Board and its processes." In his April 27 letter he was threatening the employees with the loss of their "*50¢ an hour increase* retroactive to October" (by Board action) if the Union proved its unfair labor practice charge. In his July 5 memo, he referred to the Board as "the Government" taking away their pay raise.

Although the letter and the memo were drafted to avoid referring to "the Board and its processes" by name, both were directed toward the Union's unfair labor charge filed with the Board. I find it was obvious to the employees that Bishop was telling them that the Board would take away their 50-cent wage increase, "retroactive to October," if the Union prevailed.

I therefore find that Objection 2 should be sustained, because the Employer's conduct deprived the employees of a free and fair choice in the election, requiring the August 15 second election to be set aside.

2. Objection 3

a. Original findings

The Union cites in its Objection 3 the Employer's "Ignoring and bypassing the Union by switching Health and Welfare Plans and administrators with increased benefits and improvements."

Before the hearing, in its defense, the Employer stated, in part [see the Regional Director's February 1, 2002 Supplemental Decision and Notice of Hearing] (Board Exh. 1D p. 2):

> [I]ts parent company, Florida Rock, unilaterally imposed changes in the Employer's health insurance plan, and controlled the timing of its introduction and implementation in, respectively, July and September 2001. . . . [and] that these changes were mandated in over sixty divisions of Florida Rock, including the Employer.

The evidence shows that the cost of the plans is based on all 60 divisions of Florida Rock, that savings were based on its buying power as a corporation, and that the Employer and others in the Northern Concrete Group had no choice whether to accept the new plans (Tr. 102, 157–158, 167, 192).

Whether or not the Employer's failure to consult with the Union before implementing the changes was an unfair labor

practice, I find that its failure to do so did not interfere with the employees' choice at the second election, because the Employer was not empowered to change the parent company's decision.

I therefore find that Objection 3 should be rejected.

b. Employer contentions

In the Employer's lengthy discussion in its brief (at 13–19), it contends that the evidence clearly establishes that the change in its health and welfare plan did not constitute objectionable conduct.

On considering the Employer's posthearing brief, I again agree that Objection 3 should be rejected.

1. Objection 4

a. Original findings

The Union alleged in Objection 4 that within 24 hours before the election, the Employer violated the *Peerless Plywood* rule by sending, on its computers to every employee in the bargaining unit, messages stating "Bring it to an end—Vote No—your future depends on it."

Before the hearing, the Employer's defense was as follows, without discussing the *Peerless Plywood* rule [see the Regional Director's February 1, 2002 Supplemental Decision and Notice of Hearing] (Board Exh. 1D p. 3):

> The Employer concedes running two computer messages sent to its trucks on the day before the election, but states that the first message simply reminded employees to vote, and the second message read: "Your Vote Counts. It's Your Future. Bring it to an End. Vote No.

As indicated above, the evidence (Tr. 170–179, 182–183; E. Exhs. 7–9, 10 pp. 26–31) shows that on August 14, within the 24-hour period before the second election, the Employer sent all 174 of its drivers on duty the following 7-minute, uninvited four-line campaign message, which was displayed on the 2-by-4 inch screen of the (Mobile Data Unit) MDU modem box mounted above the dashboard on each of the mixer trucks they were driving:

YOUR VOTE COUNTS
IT'S YOUR FUTURE
BRING IT TO AN END
VOTE NO

In *Peerless Plywood Co.*, 107 NLRB 427, 428–430 (1953), a case in which the employer made a noncoercive speech to assembled employees, the Board held as follows:

> [W]e now establish an election rule which will be applied in all election cases. This rule shall be that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. . . . .
>
> This rule will not interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election . . . . Moreover, the rule does not prohibit employers or unions from making campaign speeches on or off company premises during the 24-hour period if employee attendance is voluntary and on the employee' own time.

In the more recent case of *Purolite*, 330 NLRB 37, 39–40 (1999), the Board pointed out that in *Peerless Plywood*, the Board emphasized that the employees were on company time and not off the clock, free to choose whether to listen to a party's appeal, and explained that an objective was to "keep elections free of undue advantage for any party." It held that the *Peerless Plywood* doctrine demonstrates "the Board's goal . . . to keep voters as free of uninvited mass messages as possible during the period just prior to the conduct of the election."

Also in *Purolite*, the Board pointed out that in *U. S. Gypsum Co.*, 115 NLRB 734, 735 (1956)—in which a union broadcast its message from a sound truck stationed on the street—employees who were "unwillingly exposed to a campaign message became a captive audience within the meaning of *Peerless Plywood*."

The Board concluded in *Purolite* that the union's sound truck broadcast of tape-recorded music, including prounion songs, which carried into a number of employee workstations throughout the facility, "violate the standards set forth in *Peerless Plywood* prohibiting campaign speeches to a massed assembly of employees within 24 hours of an election." The Board set aside the election and directed another election.

In the present case, within 24 hours of the second election, the Employer took advantage of new technology to send all 174 of its drivers on duty its campaign message, emphasizing its previous pleas, urging them in its campaign literature (U. Exhs. 5, 6; Tr. 13–16) to "Bring It to an End" and "Vote No," to "BRING IT TO AN END!" and "VOTE NO! Time to Decide Your Future."

Although the drivers were not required to listen to an employer speech in a "massed assembly" as in *Peerless Plywood*, neither were the employees in *U. S. Gypsum* and *Purolite*. Like employees in both those cases, the drivers were on duty and subjected to an uninvited campaign message. Thus, they likewise were employees "unwillingly exposed to a campaign message [and] became a captive audience within the meaning of *Peerless Plywood*."

The Employer's four-line MDU message to all the drivers could not be ignored, because a beeper came on and stayed on until the driver turned it off. It was possible for the driver to delete the 7-minute message by sending a message or scrolling to another message, but by that time the Employer would have succeeded in communicating its short campaign message.

There was no opportunity for the Union to send the drivers such a mass message in the 24-hour period before the election.

As held in *Purolite*, the "Board's goal is to keep voters as free of uninvited mass messages as possible during the period just prior to the conduct of the election." Permitting the Employer to send its uninvited mass message within the 24-hour period in this high-tech way would violate the Board's objective to "keep elections free of undue advantage for any party."

I therefore find that Objection 4 should be sustained. I find that the Employer's conduct deprived the employees of a free

and fair choice in the election, that the second election should be set aside, and that a third election should be directed.

b. Employer contentions

In its brief (at 20–23), the Employer contends that the message on the mobile data unit screens does not constitute a "captive audience" speech with a "mass psychology," referred to in *Peerless Plywood*, 107 NLRB at 429 (1953). As discussed above, however, the later cases of *Purolite*, 330 NLRB 37, 39–40 (1999) and *U. S. Gypsum Co.*, 115 NLRB 734, 735 (1956), do not require the mass psychology of a speech before an assembly of employees.

The Employer cites Operations Vice President Render's answer to the following leading question by employer counsel (Tr. 176):

> Q. [BY MR. KRUCHKO]: So your driver is not required to see a message he doesn't want to see, correct?
> A. Right.
> MR. BEINS: Objection to the leading.
> JUDGE LADWIG: Overruled.

The Employer later contends in its brief (at 22), however, that the employees had the option of discarding the message "as soon as it had been review." As found, by that time the Employer would have succeeded in communicating its short campaign message. I discredit Render's answer to the contrary.

After considering all the contentions and authorities cited in the Employer's brief (at 20–27), I find that the Board's rulings in *Purolite* and *U. S. Gypsum* are controlling in interpreting *Peerless Plywood* rule and find that permitting the Employer to send its uninvited mass message within the 24-hour period via the high-tech Mobile Data Unit screens would violate the Board's objective to "keep elections free of undue advantage for any party."

I therefore find that Objection 4 should be sustained. I find that the Employer's conduct deprived the employees of a free and fair choice in the election, that the second election should be set aside, and that a third election should be directed.

1. Objection 12

a. Original findings

The Union alleged in Objection 12 that at the Edsall Road plant, the Petitioner, President Bishop, and Employer Attorney Joan Book "were standing at the entrance to the voting area (lab building) and shaking hands with employees who were going to vote and who were forced to walk past them."

Before the hearing, in its defense, the Employer stated [see the Regional Director's February 1, 2002 Supplemental Decision and Notice of Hearing, Board Exh. 1D p. 3]:

> The Employer contends that the named individuals attended the Edsall Road preelection conference, leaving when the conference ended through the only door that led to the parking lot. As they made their way to the parking lot, they replied to pleasantries directed to them by employees, but these exchanges were isolated and innocuous.

Five witnesses gave widely conflicting accounts about what occurred when Bishop and Book were leaving the lab building after attending the preelection conference upstairs.

The Petitioner testified (Tr. 153) that he was watching Bishop (with Book) from the time Bishop came from the lab building until Bishop reached his car and drove off, and that he never saw Bishop talk to anyone or shake anyone's hand.

Far to the contrary, the Union's recording secretary testified (Tr. 26–29, 34) that when the poles opened at 6 a.m. on August 15, he was watching from a distance, saw Bishop and Book standing at the entrance to the lab building, and saw both Bishop and Book chatting and shaking hands with employees waiting to vote, from 6:01 to 6:10 a.m.

After weighing all the testimony of the five witnesses, I credit the part of the testimony of Employer's witness, driver Wayne Lowry, in which he testified (Tr. 136, 141) that when Bishop and Book came out of the lab building, he asked them if they were aware that the Union was passing out literature and coming upon the property, and either Bishop or Book said they were.

I credit the part of the Union recording secretary's testimony (Tr. 28, 38–39) in which he testified that a line was forming, that he recalled seeing Willie Jackson and John Scruggs, two employees he knew, that there was some communication between them and Bishop, and that each conversation lasted about 10 seconds.

Bishop merely recalled (Tr. 119) that Lowry "said good morning to me, and stuck his hand out to me, and I shook his hand." I credit his testimony (Tr. 123–124) that Attorney Book did not speak to anyone. I also credit his testimony (Tr. 119) that it took him no "more than a minute, maybe two minutes" to go from the lab building door to his car, that as he passed by Jackson and Scruggs on the way, each of them stuck out his hand and said good morning, and that he said good morning to them.

Based on the credited evidence, I agree with the Employer that President Bishop's exchanges with employees waiting to vote were isolated and innocuous. I therefore find that he did not have any "sustained conversation with prospective voters waiting to cast their ballots," as required in *Michem, Inc.*, 170 NLRB 362 (1968).

I find that Objection 12 should be rejected.

b. Employer contentions

In its brief (at 31–36), the Employer contends that it did not engage in objectionable conversation with the employees outside the polling area. I agree.

CONCLUSIONS

Having found that Objections 1, 2, 4, and 5 should be sustained, I recommend that the Board find that the objections warrant ordering a new election and that it set aside the second election and direct a third election.

Dated, Washington, D.C. August 27, 2002