**Dal-Tex Optical Company, Inc. *and* International Union of Electrical, Radio and Machine Workers, AFL–CIO, Petitioner.**
*Case No. 16–RC–2571. July 31, 1962*

## SUPPLEMENTAL DECISION, DIRECTION, ORDER, AND DIRECTION OF THIRD ELECTION

Pursuant to the Board's Decision and Order dated March 14, 1961,[1] a second election was held on September 22, 1961, under the direction and the supervision of the Regional Director for the Sixteenth Region, among the employees in the appropriate unit. At the conclusion of the balloting, the parties were furnished with a tally of ballots which showed that of approximately 213 eligible voters, 207 votes were cast, of which 96 were for, and 101 were against, the Petitioner and 10 ballots were challenged. The challenges were sufficient in number to affect the results. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

The Regional Director conducted an investigation and, on November 17, 1961, issued his report on challenged ballots and objections, in which he recommended that the challenges to two ballots be sustained and the challenges to the remaining eight be overruled, and the ballots opened and counted. As to the objections, he recommended that objections Nos. 2 through 6 be overruled, and that a hearing be held on the issues raised by objection No. 1, and that the case be consolidated with Case No. 16–CA–1560,[2] involving related issues, in which a hearing had been scheduled. The Petitioner filed exceptions to the Regional Director's recommendations as to objections Nos. 2, 3, 4, and 5.

The Board has considered the report and the exceptions thereto and makes the following findings:[3]

In objections Nos. 2 and 4, the Petitioner alleged that the Employer made election speeches to employees containing threats and offers of benefits. The Regional Director found no support for these objections. The Petitioner in its exceptions thereto contends that these speeches clearly were calculated to intimidate employees for the purpose of influencing the election results. We find merit in these exceptions.

[1] 130 NLRB 1313. On May 16, 1961, the Board (Members Rodgers, Leedom, and Fanning) denied the Employer's motion for a rehearing and exceptions On August 24, 1961, the Petitioner filed a request to proceed.

[2] In view of our conclusions herein, we do not adopt the recommendation that these cases be consolidated

[3] In the absence of exceptions thereto, we adopt *pro forma* the Regional Director's recommendations that two of the challenges be sustained, that the remaining eight challenges be overruled, and that objection No 6 be overruled In view of the disposition herein of objections Nos. 2 and 4, we need not and do not pass upon objections Nos 1, 3, and 5

The Employer's president delivered speeches to employees in the plant on September 18, 19, and 21, 1961.[4] The September 18 speech included the following statements:

> Two years ago the I.U.E. Union tried to organize this plant. They went to every length to cause trouble. They misrepresented all of the facts. They conducted a vicious campaign. They did not then, nor do they now, represent any optical laboratory in Texas. Our employees were not fooled and voted against the Union by a large majority. The Union lost the election. This election was conducted by a secret ballot and was a fair election, but the Union could not stand being beaten and attempted to set aside the election. They introduced evidence before the Board, which I considered then, and do now consider, to be false and perjured. A year and a half after the election the National Labor Relations Board, based upon such evidence, decided that the election should be set aside and a new one held. After another six months the Board then decided to hold another election next week. The Company does not agree with the Board, and has maintained and is going to maintain that the election held two years ago was a valid election. And the Courts are going to have to decide whether this first election was valid. In the meantime, the Company is permitting the holding of this new election on Company property on September 22nd, because it feels that your rights can be better protected. If the Union should win this election, which I don't think it can, the Courts are still going to have to determine whether the Board was right or wrong. If the Board was wrong, which I firmly believe, the election to be held on September 22nd will not mean a thing if the Union wins it. My guess is that it will be another couple of years before this matter is settled. In the meantime, we will go on just as we are without any Union. I am explaining all of this to you so you will understand that wild promises by this Union of what is going to happen here if the Union wins don't mean a thing. I believe in law and order. When the Courts decide the matter I will abide by the decisions of the Courts.
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> [After detailing some of the benefits employees were receiving.]
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> So, why should you want a Union to represent you? Is it because you believe they can get you more than you now have, or have you been told the Union will run this plant? I have made it a practice of giving back in increased wages all efficiency gains during the year. During the year 1959 there were 270 individual

[4] These speeches are too lengthy to append in their entirety. However, the quoted excerpts are representative of the character and tenor of the remarks

raises given. During the year 1960 there were 298 raises given, and during this year already there have been 349 raises given. These are merit raises. These are wages that you get in addition to your profit sharing and pension plans. I not only provide for your old age and your family in case of your death, but as the efficiency improves you get the benefit of it in increased wages. Do you want to gamble all of these things? If I am required by the Court to bargain with this Union, whenever that may be, I will bargain in good faith, but I will have to bargain on a cold-blooded business basis. You may come out with a lot less than you have now. Why gamble because agitators make wild promises to you? If I am required to bargain and I cannot agree there is no power on earth that can make me sign a contract with this Union, so what will probably happen is the Union will call a strike. I will go right along running this business and replace the strikers. There has been a lot of talk about your being skilled workers. You only do one operation and in a short period I can train anybody to do any of these operations, as we trained most of you. I am not afraid of a strike. It won't hurt the Company. I will replace the strikers. They will lose all of their benefits. Strikers will draw no wages, no unemployment compensation and be out of a job. The Union won't pay you wages. The Union has nothing to lose. You do all of the losing. No employee is so important that he or she cannot be replaced. I am not afraid of threats. Before the last election this Union tried everything. Before this election is over, you will see how dirty the Union will get. It has no responsibility. It is not reasonable to believe that you would give up your individual rights to outside agitators and not be able to come to me as you have in the past with your problems. I cannot believe you want to change to the cold blooded bargaining basis that must follow.

In the September 19 speech he stated,[5] among other things:

Will the Union get you more wages? No, who pays the wages? I do. I built this plant. I invest the capital. I see to it that it runs 52 weeks a year. I see that the orders come in. I have consistently turned back to you in increased wages all efficiency gains made by the Company. I give hundreds of increases in wages that are merited. In 1960 I gave 349 raises. This year I have already given 442 raises. This is the right way to handle wages. The result is that you have the highest wages in the industry. This I can assure you, it is my position now, and it will be my position at all times, that you will get merit raises just as I have

[5] The speech on September 21 merely reiterated the comments made on the two earlier occasions.

been giving them over the years. If you don't merit them, you will not get them. This is nothing new. It is the system I have operated on from the beginning. I do not have to, nor will I, change it. If you believe promises the Union makes you, you will find out the Union doesn't pay wages. I do. The Union doesn't give raises. I do. Now, please remember you have to compare your wages with those of other optical laboratories in Dallas, Texas. We are at the top. It does not make any difference what Collins Electric pays or any other industry. It is what is paid in our industry. No Union and no company in our industry in Texas can match our wages and benefits.

Even a cursory reading of these portions of the speeches of the Employer's president demonstrates that they were couched in language calculated to convey to the employees the danger and futility of their designating the Union. After listing some of the existing benefits, he queried whether they wanted "to gamble all of these things," stated that if required to bargain he would do so on "a cold-blooded business basis" so that the employees "may come out with a lot less than you have now," and emphasized his own control over wages. This was a clearcut, readily understandable threat that the Employer would bargain "from scratch" as though no economic benefits had been given, and the employees would suffer economic loss and reprisal if they selected the Union.[6] Also, the reference to the probability of a strike accompanied by the threat to replace strikers with the emphasis upon their expendability and resultant loss of all their benefits was calculated to create a fear that there would necessarily be a loss of employment and financial security if the Union won. These latter statements had even greater meaning and weight occurring, as they did, after the Employer engaged in a series of unfair labor practices, including, most recently, the discharge of three employees for acting contrary to the Employer's wishes.[7]

In addition to and intermingled with the above threats were statements by which the Employer clearly conveyed the idea that designation of the Union was futile and that the Employer would not sign a contract even if required to engage in bargaining. The Employer informed the employees that in the event the Union won it

[6] Cf. *Rein Company*, 111 NLRB 537

[7] In our first decision involving this plant, we found that the Employer violated Section 8(a)(1) in attempting to prevent unionization by threats and promises of benefit. Accordingly, we entered an appropriate order and set the election aside 130 NLRB 1313. In one related case, the Board (Members Rodgers, Leedom, and Fanning) found that this Employer violated Section 8(a)(4) and (1) by discharging and demoting certain supervisors and employees because they appeared and gave testimony in the Board proceeding which led to the decision in the first case. 131 NLRB 715. In another case, the Board (Members Leedom, Fanning, and Brown) has found that this Employer violated Section 8(a)(3) and (1) by discriminately discharging certain employees just prior to the second election 137 NLRB 274. The instant case is before us on objections to the second election.

would not mean a thing because the "Courts are still going to have to determine" the issue and "my guess is that it will be another couple of years before this matter is settled;" that if required to bargain and unable to agree, no power on earth could make the Employer sign a contract ". . . so what will *probably* happen is the Union will call a strike" (emphasis supplied); and that the Employer did not have to and would not change its wage policy. While these comments may appear to be mere statements of the Employer's legal rights and his intention to adhere to them, in the present context they assume quite a different character.[8] The statement that the Employer could not be compelled to sign a contract in the absence of agreement seems innocuous on the surface. But when the same sentence was completed by pointing out the probability of a strike, when the entire sentence followed immediately after the threat to abrogate existing benefits and, in effect, bargain "from scratch," and when it was succeeded by the graphic description of the results of their replacement during the predicted strike, the entire import and impact of the comment was changed to a clear message that the Employer would not sign a contract even if required to negotiate. This message was reinforced by the other statements noted above, particularly the Employer's position that it *would not* change its wage policy, undeniably it was thus announcing a predetermination not to bargain on the subject of wages.

Prior cases involving objections to elections, have held, although not uniformly, statements similar to those involved herein to the effect that the employer would not bargain, were merely an expression of the Employer's "legal position."[9] On the other hand, it has long been well settled that the same type of statement is not within the "free speech" protection of Section 8(c) of the Act but, rather, constitutes interference, restraint, and coercion of employees within the meaning of Section 8(a)(1) of the Act.[10] We find no logic or sound reason for this disparity of treatment depending on the nature of the proceeding in which the issue is raised before the Board. Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election. This is so because the test of conduct which may interfere with the "laboratory

[8] The Employer's statements went far beyond a bare announcement that it intended to test in the courts the legality of the Board's action in setting aside the prior election. We find it unnecessary to determine in this case whether such a bare announcement, standing alone, would exceed the permissible bounds of electioneering. See *Metropolitan Life Insurance Company*, 90 NLRB 935

[9] *National Furniture Manufacturing Company, Inc.*, 106 NLRB 1300, 1301–1302 Compare *Alamo Express, Inc., et al*, 127 NLRB 89 finding that a similar statement, *inter alia*, interfered with the election

[10] E g, *Grunwald-Marx, Inc.*, 127 NLRB 476, enforcement denied on other grounds 290 F. 2d 210 (C.A. 9); *N L R B.* v. *Marion G Denton and Valedia W Denton, d/b/a Marden Mfg. Co.*, 217 F. 2d 567 (C.A. 5), enfg as mod 106 NLRB 1335, cert. denied 348 U S 981; *Reliance Manufacturing Company, et al*, 28 NLRB 1051, 1092, enfd. 125 F. 2d 311, 314 (C.A. 7).

conditions" for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).[11] Accordingly, to the extent they are inconsistent herewith, we hereby overrule *National Furniture Company, Inc., supra*, and similar cases holding such statements to be privileged under Section 8(c).

To adhere to those decisions would be to sanction implied threats couched in the guise of statements of legal position. Such an approach is too mechanical, fails to consider all the surrounding circumstances, and is inconsistent with the duty of this Board to enforce and advance the statutory policy of encouraging the practice and procedure of collective bargaining by protecting the full freedom of employees to select representatives of their own choosing. Rather, we shall look to the economic realities of the employer-employee relationship and shall set aside an election where we find that the employer's conduct has resulted in substantial interference with the election, regardless of the form in which the statement was made.

Under all the circumstances,[12] as analyzed in the above discussion, we find that the entire content of the Employer's speeches, taken as a whole, with the clear threats and the implied anticipatory refusal to bargain if the Union should win the election, generated an atmosphere of fear of economic loss and complete hostility to the Union which destroyed the laboratory conditions in which the Board must hold its elections and prevented the employees' expression of a free choice in the election.[13] We therefore sustain objections Nos. 2 and 4.

As we have overruled the challenges to eight ballots, we shall direct the Regional Director to open and count such ballots and prepare a revised tally. Further, in the event that the Petitioner does not receive a majority of the votes cast, according to the revised tally, we shall, consistent with our decision herein, order the election of September 22, 1961, set aside and direct the Regional Director to hold a third election as early as possible thereafter.

[The Board directed that the Regional Director for the Sixteenth Region shall, within 10 days of this Directon, open and count the ballots of Riggs Harris, Jessee Martinez, Milton Pettis, Raymond Keith, Frutoso Juarez, Duncan Lewis, Leo Sandero, and Harry Gold-

[11] Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases and it has no application to representation cases. *General Shoe Corporation*, 77 NLRB 124 Cases such as *National Furniture Company, Inc*, 119 NLRB 1; *The Lux Clock Manufacturing Company, Inc*, 113 NLRB 1194; *Esquire, Inc. (Coronet Instructional Films Division)*, 107 NLRB 1238; and *American Laundry Machinery Company*, 107 NLRB 511, are hereby overruled to the extent they suggest that Section 8(c) is applicable to preelection statements The strictures of the first amendment, to be sure, must be considered in all cases.

[12] See *N.L R B. v. Virginia Electric and Power Company*, 314 U S. 469

[13] See *Haynes Stellite Company, Division of Union Carbide Corporation*, 136 NLRB 95

berg, and serve upon the parties a revised tally of ballots, and issue certification.

[The Board set aside the election conducted on September 22, 1961, among the employees of Dal-Tex Optical Company, Inc., at its Dallas, Texas, plant.

[Text of Direction of Third Election omitted from publication.]

MEMBER LEEDOM, concurring:

I agree with the majority that the election should be set aside and a third election directed. I deem it sufficient that the Employer in effect told his employees that he would not bargain in good faith, regardless of the outcome of any court proceedings designed to test the validity of the Board's certification, should the Union win the election.[14] I therefore find it unnecessary to consider other aspects of the Employer's conduct.

MEMBER RODGERS took no part in the consideration of the above Supplemental Decision, Direction, Order, and Direction of Third Election.

[14] Such statements are markedly different from the mere statement that an employer would refuse to bargain in order to test the validity of a Board certification in the courts, or a statement that it would engage in "hard" bargaining.

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**Hoisting and Portable Engineers Local 101, affiliated with the International Union of Operating Engineers, AFL–CIO *and* Don Anderson, Rex Forbes, Steve Straten and Marvin Creech, employees of Warren Weibel, an individual d/b/a Weibel Excavating Company.** *Case No. AO–38. July 31, 1962*

## ADVISORY OPINION

This is a petition filed by Hoisting and Portable Engineers, Local 101, affiliated with the International Union of Operating Engineers, AFL–CIO, herein called Local 101, or Union, for an Advisory Opinion in conformity with Sections 102.98 and 102.99 of the Board's Rules and Regulations, Series 8, as amended. Thereafter, on June 11, 1962, Don Anderson, Rex Forbes, Steve Straten, and Marvin Creech, herein called Plaintiffs, filed an answer to the petition for Advisory Opinion. On June 27, 1962, Local 101 filed a supplement to its petition and on July 16, the Plaintiffs filed an answer to the supplement.

A. In pertinent part, Local 101's petition and supplement allege as follows: