

**Carry Companies of Illinois, Inc. and Local 705,
International Brotherhood of Teamsters, AFL–
CIO, Petitioner.** Case 13–RC–18195

March 29, 1993

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in an election held July 15, 16, 17, and 18, 1992, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 95 for and 133 against the Petitioner, with 40 challenged ballots, a number sufficient to affect the election results.

The Board has reviewed the record in light of the exceptions¹ and brief,² has adopted the Regional Director's findings and recommendations, and issues a direction remanding the case for further appropriate action.

1. The Petitioner has excepted, inter alia, to the Regional Director's recommendation to overrule its Objection 5, which alleges that a video distributed by the Employer to employees contained an unlawful threat of plant closure. The Petitioner cited portions of the alleged objectionable statements in its brief. Having examined the record as it relates to this objection, and accepting the accuracy of the Petitioner's characterizations of the statements contained in the video, we agree with the Regional Director that these statements do not constitute objectionable threats of plant closure. We note that the statements did not purport to emanate from the Employer (or any official of the Employer), but rather were the statements (and hence the views) of a fictional employee concerning his prior work ex-

perience at a union company.³ Thus, the Petitioner's reliance on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and its progeny is misplaced.⁴ Rather, we find this type of statement to be plainly recognizable to employees as employer propaganda.

Further, even assuming that this propaganda constitutes a misrepresentation of fact or law, we agree with the Regional Director that under the standards enunciated in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), it is not objectionable and does not warrant setting aside the election. Accordingly, we find no merit in the Petitioner's exceptions, and we adopt the Regional Director's recommendation to overrule Objection 5.

2. The Petitioner also has excepted to the Regional Director's recommendation to overrule its Objection 7,⁵ which alleges that dispatchers are supervisors and therefore that their presence in the polling area during the election was objectionable.⁶ We note that on November 8, 1990, the Board adopted the Regional Director's finding in the prior representation case (13–RC–18093) that dispatchers are not supervisors. The Petitioner in that case was afforded the opportunity to make its arguments before both the Regional Director and the Board, and those arguments were rejected on their merits. In addition, we note that in the related unfair labor practice case (see fn. 1) the Petitioner presented evidence and set forth its arguments on this issue. Again, consistent with the previous representation case, these arguments were considered and rejected by the judge. Accordingly, we find that this issue has been fully argued and litigated, and in the absence of evidence of changed circumstances (which the Petitioner has failed to produce either here or in the related unfair labor practice cases), we adopt the Regional Director's finding that dispatchers are not supervisors within the meaning of the Act.

¹In the absence of exceptions, we adopt pro forma the Regional Director's recommendation to open and count the ballots of K. Gray, D. Miller, Larry Parent, Wesley Williams, M. Schreiber, F. Harak, and A. Tozzi, and to hold the remaining challenged ballots in abeyance pending the issuance of a revised tally of ballots and a determination of whether these remaining ballots continue to be determinative.

We further grant the Petitioner's motion to take administrative notice of the record and administrative law judge's decision in the related cases, 13–CA–29715, 13–CA–29768, 13–CA–29910, 13–CA–30075, and 13–CA–30219, and we have given due consideration to those cases.

²With regard to the Petitioner's Objection 3, which alleges that the Employer unlawfully compensated employees for voting in the election, Chairman Stephens notes, consistent with his dissent in *Young Men's Christian Assn.*, 286 NLRB 1052, 1054 (1987), that the payments here were carefully restricted to cover only time (at the normal rate of pay) and travel expenses for the purpose of transporting voters to the voting site. See *id.* at 1054 fn. 6. Accordingly, he agrees that the reimbursements here would not reasonably tend to influence the election outcome.

³The Petitioner describes the video as portraying a conversation among several fictional employees regarding the relative merits of unionization. The Petitioner alleges that the objectionable statement was made by one of these employees (a fictional former Teamsters employee), who explains his experience at the facility of a Teamsters employer where the employees voted against a contract negotiated by the Teamsters and as a result the employer closed the plant.

⁴Those cases involve an employer's expression of a prediction as to the results of unionization. Such predictions must be based on objective facts to convey the employer's belief of probable consequences beyond its control or to convey a management decision already arrived at to close the plant in the event of unionization. Here, the statements contained in the video are not employer-expressed predictions of future events, but rather are partisan statements of campaign propaganda.

⁵The Petitioner's brief in support of exceptions erroneously refers to Objection 9; however, the substance of its exception relates to Objection 7.

⁶The Petitioner did not specifically set forth its arguments in its exceptions, but rather cited its arguments (as the Charging Party) set forth in its brief in support of exceptions to the administrative law judge's decision in the related unfair labor practice cases.

DIRECTION

IT IS DIRECTED that this case be remanded to the Regional Director for Region 13, who shall, within 14 days from the date of this Decision and Direction, open and count the ballots of K. Gray, D. Miller, Larry Parent, Wesley Williams, M. Schreiber, F. Harak, and A. Tozzi, and that thereafter the Regional Director shall prepare and serve on the parties a revised tally of ballots.

IT IS FURTHER DIRECTED that, if the revised tally of ballots show that the remaining challenged ballots are no longer determinative, the Regional Director shall issue an appropriate certification; if the revised tally of ballots show the remaining challenged ballots are still determinative, the Regional Director shall institute further appropriate proceedings to resolve those challenges.

MEMBER OVIATT, concurring.

For the reasons discussed below, I agree with, *inter alia*, my colleagues' overruling of Objection 5, and also with their overruling of Objections 4 and 12 (which are not directly discussed in the majority opinion).

Objection 5 alleges a threat of plant closure. Objection 4 alleges a misrepresentation of fact, and Objection 12 alleges that the Employer's video tapes in question contain misrepresentations of law and fact, as well as threats of reprisals and promises of benefits.

The Petitioner offered the video tapes in support of all three of these objections. In recommending the overruling of these three objections, the Regional Director first found that the video tapes do not contain threats or promises. I join my colleagues in affirming this finding, thus disposing of all of Objection 5 and

that part of Objection 12 which alleges threats and promises.

The Regional Director further found that even assuming, *arguendo*, the video tapes contained misrepresentations of fact or law, as alleged, the misrepresentations alone would be insufficient to warrant setting aside the election, citing *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). The Regional Director thus disposed of the remainder of Objection 12 and all of Objection 4. My colleagues have affirmed the Regional Director's recommendations in these respects also. I join them in doing so, but for the following reasons.

Although the Petitioner excepted to the Regional Director's recommended overruling of all three objections in question,¹ the Petitioner has only presented supporting argument in regard to the alleged threat of plant closure asserted in Objection 5, and has not presented any supporting argument in regard to the alleged threats and promises asserted in Objection 12 or to the alleged misrepresentations asserted in Objections 4 and 12.

In light of the Petitioner's failure to present any arguments in support of its exceptions to the Regional Director's recommended overruling of the Petitioner's misrepresentation objections, I therefore find it unnecessary, in affirming the Regional Director's recommendations, to pass on her discussion of the merits of those objections under *Midland National*.

¹ The Petitioner expressly excepted to the Regional Director's recommendation to overrule Objection 5, and also excepted to "The recommendation to overrule Petitioner's objections 4 and 6 [emphasis added] on the grounds they merely allege unobjectionable misrepresentations." The Petitioner's reference to Objection 6 rather than Objection 12 in this context appears to be a typographical error, because Objection 6 did not allege misrepresentations.