

Anderson Cottonwood Concrete Products, Inc. and General Teamsters and Warehousemen, Local No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Anderson Cottonwood Concrete Products, Inc. and General Teamsters and Warehousemen, Local No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Operating Engineers Local No. 3, International Union of Operating Engineers, AFL-CIO, Joint Petitioners. Cases 20 CA-13898 and 20-RC-14603

December 14, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On February 2, 1979, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to Respondent's exceptions and in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(6) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Contrary to our dissenting colleague, we think the record evidence and the reasonable inferences to be drawn therefrom fully support the Administrative Law Judge's conclusion that Respondent's involvement in the "picture-taking" incident 2 days before the election violated Section 8(a)(1) of the Act.

In brief, the Administrative Law Judge found that Respondent violated Section 8(a)(1) on February 20, 1978, when dispatcher Villavicencio told employee Barstow that Respondent would close or cut back if the Union got in; on March 8 when Villavicencio told employee Harrison that Respondent would "probably have to cut back" if the Union won; and on an

occasion a week or so before the July 7 election when Respondent's owner, John Murphy, told employee Harlan a union victory would cause the sale or closing of the business.

The Administrative Law Judge found an additional violation of Section 8(a)(1) when, 2 days before the election, an appraiser, accompanied by Murphy, spent a full morning at the plant taking pictures of the trucks and other equipment. In so finding, the Administrative Law Judge relied on the following factors: (1) the timing of the appraisal, (2) the suspicious circumstances surrounding the appraisal procedure itself, and (3) the fact that Respondent had threatened previously to close down or cut back by selling off trucks.

Our colleague, in declining to find the picture-taking incident violative of Section 8(a)(1), contends that the July 7 date of the appraisal was selected by the appraiser "apparently for his own personal convenience." She also speculates that there is no basis for suspicion, despite the extremely informal appraisal procedures.

At the outset, we note that Respondent failed to show any pressing business need to explain why the appraisal in question had to be conducted prior to the election date. Indeed, even if the appraiser selected the *particular* date of the appraisal, it was Respondent who contacted the appraiser in May to arrange the picture-taking session. Yet, as the Administrative Law Judge pointed out, as late as the hearing in this proceeding (some 4 months *after* the picture-taking incident), no written appraisal had been delivered to Murphy. And without such a written appraisal, the loan which Murphy claims made the picture taking necessary could not be secured. Moreover, as the Administrative Law Judge also pointed out, of necessity Respondent was well aware of the probable coercive impact of the appraiser's preelection visit since, as our colleague concedes, it had on several occasions threatened employees with sale of the plant or cut-backs in the number of trucks in the event of a union victory.

Finally, our colleague overlooks or ignores the fact that Murphy personally accompanied the appraiser on his rounds of the plant and was questioned by at least one employee about the significance of the picture-taking. Murphy's failure to dispel the employee's expressed concern over the incident by a clear and precise statement speaks volumes about his motives.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby or-

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

ders that the Respondent, Anderson Cottonwood Concrete Products, Inc., Cottonwood, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election held on June 7, 1978, in Case 20-RC-14603 be, and it hereby is, set aside and that a new election be conducted.

[Direction of Second Election² omitted from publication.]

MEMBER MURPHY, dissenting in part:

I agree with my colleagues and the Administrative Law Judge that on February 20, 1978,³ and on March 8, prior to the filing of the petition in Case 20-RC-14603, and in late May, during the critical preelection period, Respondent violated Section 8(a)(1) of the Act by threatening employees with plant closure and/or reduction in work if the Union won the election. I do not agree with their finding, however, that the June 5 "picture-taking" incident was also unlawful and in violation of Section 8(a)(1) of the Act.

The facts relevant to the picture-taking incident are as follows: Respondent's president, John Murphy, testified without contradiction that pursuant to certain new rules established by the California State Water Control Board in late 1977 Respondent was required to install and to have operational by October, some new antipollution equipment. According to the timetable set by the State, construction on the project was to begin sometime in April.⁴

In an effort to begin compliance with the State's requirements, in early May Murphy contacted Antoine Le Conge, manager of the Shasta County Bank in Cottonwood, California, to see about getting a loan with which to finance the purchase and installation of the antipollution equipment.⁵ Thereafter, by letter dated May 12, Le Conge informed Murphy that "an updated appraisal" was needed on Respondent's property in order to "establish a value for the purpose of securing a loan in the amount . . . discussed."

Pursuant to the bank's instructions Murphy, either that same day or the following day, contacted Tom Straughn, an appraiser with whom Murphy had had many prior business dealings, and asked him if he could perform such an appraisal, to which Straughn agreed. While no date was set for the appraisal, sometime in late May Straughn called Murphy and informed him that he (Straughn) would be at Respondent's premises on June 5 to perform the appraisal. Murphy agreed.

² [Excelsior footnote omitted from publication.]

³ All dates herein are in 1978 unless otherwise indicated.

⁴ Respondent was subsequently given an extension of time until sometime in 1979 in which to complete the installation of its antipollution equipment.

⁵ Murphy frequently did business with Shasta County Bank through Le Conge.

On June 5, Straughn, accompanied by Murphy, photographed all of Respondent's equipment, including trucks. According to employee William Barstow, at one point during the photographing Straughn asked Barstow about the condition of his truck. About an hour or two later, Barstow, concerned that Straughn might be an insurance investigator investigating the condition of his truck, asked Murphy what it was all about, and Murphy replied that Straughn "was an estimator, looking at the equipment."⁶ Upon completion of the appraisal Straughn gave Murphy "a ballpark figure" which was followed 2 or 3 days later by a more refined estimate. Shortly thereafter, Murphy orally informed the bank of the appraisal.⁷

My colleagues, in their efforts to bolster and give credence to the Administrative Law Judge's rather dubious finding that the above incident was unlawful, have conveniently chosen to ignore certain essential facts which would militate against such a finding, have engaged in speculation, and have revised the facts to fit their conclusion. First, they have chosen to ignore the fact that the appraisal was performed at the bank's request, and that it was Straughn, and not Murphy, who selected the June 5 appraisal date, apparently for his own personal convenience. Second, their assertion that the timing of the appraisal was unexplained is itself inaccurate and amounts to pure speculation. Rather, the fact shown on this record that Respondent had originally been required to begin construction on its antipollution equipment by April, and to have it operational by October, affords a reasonable basis for concluding that Respondent was merely attempting to comply with the State's requirement when it allowed the appraisal to be performed prior to the June 7 election date.⁸ Thus, contrary to my colleagues, I find nothing improper in the fact that the appraisal was performed prior to the election.

Finally, my colleagues erroneously claim that Murphy failed to dispel Barstow's "expressed concern over the incident by a clear and precise statement" and they conclude that Murphy's failure to do so "speaks volumes about his motives." However, these

⁶ The Administrative Law Judge discredited Barstow's testimony that Murphy further stated that he was getting rid of the older trucks. Rather, he credited Murphy's version that, while no such statement was made at that time, Murphy did tell a mechanic, in Barstow's presence sometime in March, that he would have to get rid of two of the older trucks if he was to get two new ones. At that time, Respondent was negotiating for the purchase of two new trucks.

⁷ The Shasta County Bank, as well as four other lending institutions to which Murphy orally submitted the appraisal, already had an appraisal on file which merely needed updating.

⁸ The General Counsel argues that no written appraisal was given, although required for the loan. But, as noted above, Respondent subsequently obtained an extension of time in which to begin construction of the project, thus explaining why Respondent had submitted only oral, and not written, appraisals to various banks which, as indicated, already had written appraisals on file.

"facts" are not supported by the record. As appears from my summary of the facts, *supra*, it is clear from Murphy's credited version of this incident that Barstow's only concern dealt with the possibility that Straughn might be an insurance investigator. Thus, when questioned by Barstow as to Straughn's identity, Murphy truthfully replied that Straughn was an appraiser, thereby allaying any doubt Barstow may have had concerning Straughn's identity or the purpose of his visit. Given these facts, it is impossible to justify a finding that Murphy failed to dispel any fear Barstow may have had concerning the incident or to discern an unlawful motive from Murphy's remarks. Accordingly, for the reasons stated, I would not find the picture-taking incident to be unlawful.

Notwithstanding my finding herein, I nevertheless join my colleagues and the Administrative Law Judge in finding that the election should be set aside since the remaining violation occurring during the critical period—a threat of plant closure—was of sufficiently serious nature as to reasonably have affected the employees' freedom of choice in the election. Accordingly, the June 7 election should be set aside and a new one conducted.

APPENDIX

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

WE WILL NOT threaten employees with plant closure or a reduction in operations if they select Teamsters Local 137 and Operating Engineers Local 3 to represent them.

WE WILL NOT reinforce prior threats to close or reduce our operations if our employees select said Unions to represent them, by having pictures taken of our trucks and other equipment in the presence of employees.

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

ANDERSON COTTONWOOD CONCRETE PRODUCTS, INC.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: These consolidated cases were heard at Redding, California, on October 3 and 4, 1978. The charge and amended charge in Case 20-CA-13898 were filed, respectively, on June 16 and July 21, 1978, by General Teamsters and Warehousemen,

Local No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Teamsters Local 137. The complaint, which issued on July 24, 1978, alleges that Anderson Cottonwood Concrete Products, Inc., herein called Respondent or the Employer, violated Section 8(a)(1) of the National Labor Relations Act, as amended.

On April 24, 1978, Teamsters Local 137 and Operating Engineers, Local No. 3, International Union of Operating Engineers, AFL-CIO, herein called Operating Engineers Local 3 (Teamsters Local 137 and Operating Engineers Local 3 are jointly referred to herein as the Union), jointly filed a petition for an election in Case 20-RC-14603. Pursuant to a Stipulation for Certification upon Consent Election approved by the Regional Director for Region 20 on May 22, 1978, an election by secret ballot was conducted on June 7, 1978, among the employees of the Employer in an agreed-upon appropriate bargaining unit.¹ The tally of ballots which was served upon the parties immediately following the election showed that, of approximately 19 eligible voters, 18 cast ballots of which 7 were for the Union, 8 were against the Union, and 3 were challenged. The challenged ballots were sufficient in number to affect the results of the election and on June 12, 1978, the Union filed timely objections to the election. The Regional Director for Region 20 caused an investigation of the objections and challenged ballots to be made and, thereafter, on June 25, 1978, issued and served on the parties a Report on Objections and notice of hearing. In her report the Regional Director recommended to the Board that the Union's Objections 1 and 2 be overruled, that the challenges to the ballots of Wayne Norcross and Leslie Whitehurst be sustained, and that the challenge to the ballot of Kenneth Nelson be overruled. She concluded that the issues raised with respect to Objection 3 (an allegation that the Employer prevented an eligible voter from voting on the day of the election), and on additional matters (that Respondent through its president, Murphy, told an employee that the Employer would go out of business if the Union prevailed in the election, and that Respondent created the fear of such a cessation of business by taking pictures of capital equipment shortly before the election), might best be resolved at a hearing. The Regional Director concluded that upon final disposition of Objections 1 and 2 and the challenged ballots Case 20-RC-14603 and Case 20-CA-13898 would be consolidated. No exceptions to the Regional Director's report were filed by any of the parties within the time provided, and on August 18, 1978, the Board adopted the Regional Director's recommendations as contained in her report. The Board ordered that the Union's Objections 1 and 2 and the challenge to the ballot of Kenneth Nelson be overruled and that the challenges to the ballots of Wayne Norcross and Leslie Whitehurst be sustained. The Board found that it was unnecessary to direct that the ballot of K. Nelson be opened and counted, as it was no longer determinative. In conclusion, the Board ordered that the issues raised with respect

¹ The bargaining unit was: "All drivers, mechanics, mechanics' helpers, welders, laborers, equipment operators, crusher plant operators and batch plant operators; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act."

to the Union's Objection 3 and the additional matters be processed pursuant to the Regional Director's report. On September 13, 1978, the Regional Director issued an order consolidating cases and notice of hearing, in which she found that matters alleged in the Union's Objection 3 and the other matters were substantially similar to conduct alleged to constitute unfair labor practices in the complaint issued in Case 20-CA-13898. She ordered that Cases 20-CA-13898 and 20-RC-14603 be consolidated for the purposes of hearing.

Issues

The primary issues are:

(1) Whether Respondent violated Section 8(a)(1) of the Act by telling employees and causing employees to believe that it would curtail its business or terminate its operation if they selected the Union to represent them.

(2) Whether the Company engaged in conduct which prevented a fair election and whether the election should be set aside.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Employer, and the Union.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation with its principal place of business in Cottonwood, California, is engaged in the wholesale sale of ready-mix concrete, and sand and gravel. During the year immediately preceding issuance of complaint Respondent purchased and received goods and materials valued in excess of \$50,000 directly from points outside California. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Teamsters Local 137 and Operating Engineers Local 3 are and each is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent sells and delivers concrete and other products from a plant located in Cottonwood, California. In July 1974 John Murphy, president of Respondent, purchased the business from a previous employer. His dispatcher is Karl Villavicencio.² Respondent does not recog-

² Villavicencio hires and fires employees. Respondent admits and I find

nize any union as the representative of its employees. When Murphy took over the operation of the business in 1974 two of the employees of the previous employer stayed on and worked for Respondent. One of them was William Harland.

In early February 1978 the Union began an organizational campaign among Respondent's employees. A union meeting was scheduled for February 13, 1978. Shortly before the meeting employee Chris Harrison told Villavicencio about the scheduled meeting. On February 13 Murphy and Villavicencio hand-delivered an antiunion letter³ to all the employees at their homes.

The Union filed a petition for an election on April 24, 1978, and the election was held on June 7, 1978.

B. The Alleged Unlawful Remarks Made to Employees

1. Harland

William Harland has been a member of Operating Engineers Local 3 since 1962. He is still employed by Respondent and has worked for Respondent and its predecessor for 16 years. When Murphy took over the business in 1974 Respondent saw to it that Harland's pension rights with the Operating Engineers were continued by paying benefits to the fund on Harland's behalf.

In the latter part of May 1978, about a week or 10 days before the June 7 election, Harland and Murphy had a conversation on company premises concerning the contributions that were being made on behalf of Harland to the Operating Engineers' pension fund. In the course of that conversation Murphy told Harland that if the Union won the upcoming election he (Murphy) would not be able to compete with the people uptown because of the distance he had to travel, and that he would probably have to sell out and close up.⁴

2. Barstow

William Barstow worked for Respondent from December 1976 to August 24, 1978. He was discharged shortly after he told Respondent that he had put in an application for employment with another company.

On or about February 20, 1978, Barstow had a conversation with Villavicencio in Villavicencio's office. During the

that Murphy and Villavicencio are supervisors within the meaning of the Act.

³ The complaint does not allege that anything in the letter violated the Act, and the General Counsel stated that he was introducing the letter in evidence not to establish a violation by the letter, but to establish times and dates.

⁴ This finding is based on the testimony of Harland. Murphy acknowledged that he had a conversation with Harland at that time, but his version was substantially different. According to the testimony of Murphy, Harland raised the topic of the Union by saying that he would be glad when the union "b.s." was over, and that he did not think anything was going to come of it, and Murphy replied by saying that he would be just as glad and that if it did go union it was going to be tougher to compete in Redding. Harland was a very believable witness. He is still working for Respondent, and he is particularly vulnerable because Respondent is voluntarily paying pension benefits on his behalf. It would not be in his personal interest to testify in a manner that would antagonize Respondent. As is set forth in more detail below with regard to the picture-taking incident and other matters, Murphy was not always candid in his testimony. As between Harland and Murphy, I credit Harland.

course of that conversation Villavicencio told Barstow that if the Union got in Murphy would either close the plant down or would scale it down so that only three or four trucks would be needed.⁵

3. Michael Harrison

Michael Harrison was employed by Respondent from November 1976 until June 8, 1978, when he was discharged because he had an accident. Michael Harrison testified that both Murphy and Villavicencio spoke to him about what would happen if the Union won the election. However, his testimony was so confused and internally contradictory that it is difficult to use it as a basis for firm factual findings. The difficulty may well be traced to nervousness rather than an attempt to cloud the facts, but the result is that little of the testimony can be used as probative evidence. When asked whether he had occasion during February 1978 to talk to Villavicencio concerning what the Employer would do if the Union won the election, he answered, "no, no that I can say without a doubt." Later in his testimony he averred that in February Villavicencio told him in the presence of a number of employees that the Company would be reduced to four trucks if the Union became the bargaining representative, and that on other occasions Villavicencio said that the trucks would be sold off. In an affidavit he gave to the General Counsel he made no mention of Villavicencio telling him that the trucks would be sold if the Union came in. He testified that during the second week of May 1978 he asked Murphy about job security because he was thinking of buying a house, and that Murphy told him that if he had not signed a union card he should not have any problem. When further examined by the attorney for the Petitioner he expanded on that testimony and averred that in addition Murphy told him that, if the Union were voted in, he was going to reduce the fleet to four trucks and sell the rest of them. On redirect counsel for the General Counsel had Michael Harrison repeat his testimony concerning the May meeting with Murphy. He again left out any mention of Murphy's reference to the reduction of the fleet or the sale of trucks. When prodded by the counsel for the General Counsel he averred that he did not remember anything else about the conversation. When shown his affidavit he averred that Murphy did talk about reducing the force to four trucks if the Union were voted in.

Murphy and Villavicencio, in effect, denied that they made the remarks attributed to them by Michael Harrison. In view of Michael Harrison's unconvincing demeanor and the inconsistencies in his testimony, I am unable to credit

⁵ This finding is based on the testimony of Barstow. Villavicencio in his testimony denied that the conversation took place. Barstow was very clear and specific in his testimony, and his demeanor was such as to inspire confidence. In an affidavit that he gave to the General Counsel during the investigation of the case he averred that Villavicencio told him that if the Union came in Murphy would scale that plant down, and that there would be drivers eliminated. That affidavit did not mention the close of the plant. Both the testimony at the hearing and the affidavit indicated that Villavicencio spoke about a loss of jobs if the Union were voted in. I believe that the testimony at the hearing was a more complete version of the conversation than was set forth in the affidavit, and I do not believe that Barstow was manufacturing new material at the hearing. In addition, it is noted that Villavicencio's remarks to Barstow about closing were similar to those made by Murphy to Harland. I credit Barstow and do not credit Villavicencio.

his testimony in the face of those denials. However, Villavicencio did admit that there was one conversation with Michael Harrison in which a cutback due to the Union was mentioned. Villavicencio credibly testified to the following incident: On March 8, 1978, Michael Harrison told Villavicencio that he was concerned about whether he would be able to purchase a house if the plant went union. Michael Harrison asked Villavicencio whether he would be able to hold down his job if the plant went union. Villavicencio answered that he did not see why not and there was no reason why it should injure Harrison's job. Villavicencio also said, "My opinion, if the plant went union, we would have to cut back probably a little bit. We wouldn't be able to compete in Redding now."

4. Chris Harrison

Chris Harrison was employed by Respondent from April 1976 until April 1978, when he quit.

Chris Harrison testified to the following: In early February 1978, before the union organizational drive began, he had a conversation with Murphy in the company yard. Murphy said that he had heard that Chris Harrison would like to go union. Harrison answered that it was not the idea of going union, but he would like to see some sort of retirement. During the conversation Murphy said that he could sell the mixers and just run dry materials at the plant and make a good living. Murphy spoke of the existing working conditions and said that if Harrison did not like it he could go down the road. About the first of March, Harrison asked Villavicencio on the telephone how the thing was going with the Union. Villavicencio replied that, if the employees went union, Murphy would go union, but he would cut the fleet back to four or five trucks and deliver to the Anderson and Cottonwood area only. Sometime between then and the date of the election Murphy told Harrison that the Union caused him to go out of business in San Diego.

Chris Harrison testified to the above matters on direct examination. When examined by the Union he added a new time; he averred that on the day of the election, shortly after the ballots were tallied, Murphy told him that if the Union had won they would have closed down.

Murphy and Villavicencio denied that they made the remarks attributed to them by Chris Harrison.

Chris Harrison credibly testified that he gave an affidavit to the General Counsel. After Harrison testified on direct examination, Respondent made a timely request for his affidavit. While not denying that the affidavit had been taken, counsel for the General Counsel stated on the record that she had never seen the affidavit, that after searching her files she was unable to find an affidavit, and that the Board agent who had allegedly taken the affidavit had no clear recollection of it. Harrison credibly testified that he did not have a copy of his own. Counsel for Respondent moved to quash the testimony of Chris Harrison. I reserved ruling on the motion in order to give the parties an opportunity to brief the question. Counsel for Respondent then undertook cross-examination upon my assurance that such cross-examination would not constitute a waiver of his right to the affidavit, and that both the direct and cross-examination would be stricken if the motion were later granted. In her post-trial brief, counsel for the General Counsel cites

N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro, etc., 374 F.2d 974 (9th Cir. 1967), cert. denied 389 U.S. 913. In that case 10 witnesses testified that they had given signed statements either to the General Counsel or to the Charging Party. The court held:

... the attorneys for the general counsel and for the charging party, in response to questioning by counsel for respondents, repeatedly stated that they had thoroughly searched their records and had been unable to find any statements other than those which they had already handed over. [Footnote omitted.] Where statements have been lost or destroyed in good faith the testimony of the witnesses concerned need not be struck. See *Killian v. United States*, 368 U.S. 231, 239-243; *United States v. Tomaiolo*, 317 F.2d 324, 327-328 (2d Cir. 1963), cert. denied 375 U.S. 856 (1963).

That case appears to be controlling in the instant situation. I therefore deny Respondent's motion to strike the testimony of Chris Harrison. However, as Respondent did not have an opportunity to examine Harrison's affidavit, it is appropriate to scrutinize Harrison's testimony with particular care.

Harrison's demeanor on the stand was convincing. However, as is set forth in detail below, I believe that he was less than candid in testifying about the circumstances which kept him from voting. I also find it difficult to believe that Murphy would have gratuitously remarked after the Company won the election that if the Union had won he would have closed down. After the election was over Murphy would have had nothing to gain by that remark, and his denial of it was credible. Harrison did not testify concerning that remark in his direct examination by the General Counsel and added it only when questioned by the Union. As I have serious reservations concerning Chris Harrison's credibility, I do not credit him where his testimony is contradicted by Murphy and Villavicencio.

5. Analysis and conclusions

A week or 10 days before the June 7, 1978, election, Murphy told Harland that, if the Union won the upcoming election, he (Murphy) would not be able to compete with the people uptown because of the distance he had to travel, and that he would probably have to sell out and close up. About February 20, 1978, Villavicencio told Barstow that, if the Union got in, Murphy would either close the plant down or would scale it down so that only three or four trucks would be needed. Both of those remarks went beyond permissible prediction and constituted threats that employees would lose employment if they selected a union to represent them. On March 8 Villavicencio told Michael Harrison that Harrison's job would not be in jeopardy if the Union came in, but he also said that if the plant went union it would probably have to cut back a bit, and they would not be able to compete in Redding. In the context of the other remarks made by Murphy and Villavicencio, that statement also constituted a threat that some employees would lose employment if the employees selected the Union to represent them.

In *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575,

618-620, (1969),⁶ the United States Supreme Court drew the line between permissible predictions and unlawful threats as follows:

... an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and know only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967).

Murphy and Villavicencio made their remarks concerning what could happen if the Union won the election before the Union had any bargaining rights and before the Union made any bargaining demands. They could not know what the outcome of future bargaining might be. Their remarks to the effect that employees would lose their jobs if they selected the Union to represent them were impermissible threats of economic reprisal to be taken solely on Respondent's own volition. As such they violated Section 8(a)(1) of the Act.

C. The Picture-Taking Incident

Thomas Straughn buys and sells new and used trucks and other business equipment. He had bought and sold equipment for Murphy on many occasions. Several weeks before the June 7, 1978, election, Murphy called Straughn and asked him to come to the plant to appraise all his equipment. On June 5, 1978, 2 days before the election, Straughn spent the entire morning at the plant appraising everything at the plant, including the rolling stock and fixed machinery. In the process of his appraisal he took pictures of the trucks and machinery. There was nothing surreptitious.

⁶ See also *Hanover House Industries, Inc.*, 233 NLRB 164 (1977); *Jimmy-Richard Co., Inc.*, 210 NLRB 802 (1974), enf'd, 527 F.2d 803 (D.C. Cir. 1975).

tious about his picture-taking, and a number of employees saw him doing it. He was accompanied on his rounds by Murphy. Michael Harrison and William Harland observed Straughn taking pictures, but they did not talk to Murphy about it. Straughn took a picture of Barstow's truck and asked Barstow about the condition of the truck. Straughn had never before taken pictures of Respondent's trucks. An hour or so later Barstow asked Murphy what it was all about, and Murphy said that an estimator was looking at the equipment.⁷

Murphy testified that he needed an appraisal in order to apply for a bank loan, and that the loan was needed to pay for certain pollution abatement equipment that he was required to purchase. Murphy may well have needed the appraisal and needed the loan. However, the timing of the picture-taking is suspect. After threatening to reduce or close the plant if the Union won the election, Murphy's action in having a picture-taking appraisal of all the equipment just 2 days before the election must have been viewed by the employees as a reaffirmation of those threats. Murphy must be held responsible for the reasonably anticipated consequences of his actions. No proof of union animus or coercive intent or effect is necessary for a finding of an 8(a)(1) violation where the employer engages in conduct which, it may reasonably be said, interferes with the free exercise of employee rights under the Act. *Dover Garage II, Inc.*, 237 NLRB 1015 (1978).⁸ Respondent has not shown that there was any compelling need to take the pictures or have the appraisal immediately before the election. The entire appraisal procedure was extremely informal. Straughn received no compensation for making the appraisal. He made an oral report to Murphy, and as of the date of the hearing (some 4 months after the appraisal was made), he still had not submitted a written appraisal to Murphy. A written appraisal would have been required before a loan could have been made.

In the light of the prior threats, I find that the picture-taking on June 5, 1978, constituted an implied threat to sell equipment or close the plant if the employees selected the Union to represent them, and as such it violated Section 8(a)(1) of the Act.

D. *The Allegation That Respondent Prevented Chris Harrison From Voting*

The election was conducted on June 7 between 4 and 6 p.m. On June 7, Chris Harrison ended his workday and

punched out at 3 p.m. He went back on the clock and left the plant for an additional concrete delivery at 3:45 or 3:50 p.m. Though there was a great deal of conflicting testimony with regard to that incident, there was agreement on certain matters. Chris Harrison was returning to the plant when Murphy contacted him on the radio telephone about 5:40 p.m. At that time Harrison was about 5 miles from the plant. Murphy told Harrison to hurry up and try to make it because he wanted everyone to have a chance to vote. Harrison replied that he thought he could make it. Murphy then told Harrison that he would go to the plant in case Harrison did not get there on time and ask them to hold the polls open for him to vote.⁹ Murphy came into the office where the election was taking place at 6 p.m. He told the Board agent that he had spoken to Chris Harrison shortly before, and that Harrison was going to be coming in at any minute. He said that he would appreciate it if the polls could be left open to give Harrison a chance to vote. Union Representatives Cochran and Havenhill objected, saying that they had agreed to a 6 p.m. close, and no one would get to vote who came in after 6 p.m. The Board agent told them, in effect, that he would only keep the polls open if they all agreed. The union agents said they would not agree. The Board agent then closed the polls about 2 minutes after 6 p.m.¹⁰

A short time after the polls closed Harrison returned to the plant and attempted to vote. He was told that the polls had been closed. In a conversation with Villavicencio Harrison said that he was glad he did not get to vote, and that no one could blame him if it did or did not go union.¹¹

With regard to the dispatch of Chris Harrison, there was a substantial conflict in the testimony. Harrison testified that between 3:15 and 3:30 p.m. Villavicencio asked him to go on the clock and take the delivery, and that he said that he would. Harrison averred that he believed he would be putting his job on the line if he refused. In the past he had refused certain deliveries because of safety factors, but he had never done so for other reasons. Villavicencio testified that he told Harrison that he could take the delivery if he wanted to, but that he could wait until 4 p.m. if he wanted to vote before taking out the load. He also averred that he told Harrison that he could wait until 4 p.m. so that another driver could take the load if another driver came in. As between Villavicencio and Harrison, I credit Villavicencio. It was apparent from Murphy's actions in trying to keep the polls open that he wanted to give Harrison a chance to vote. I do not believe that Murphy and Villavicencio were working at cross-purposes. I credit Villavicencio's assertion

⁷ Barstow testified that, in addition to the mention of an estimator, Murphy said that he was going to get rid of some of the older trucks. There was no mention of the older trucks in Barstow's affidavit. Murphy, in his testimony, acknowledged telling Barstow that the man taking the pictures was an appraiser, but he denied saying anything about getting rid of some old trucks. Murphy did acknowledge that he may have spoken about getting rid of old trucks at another time. Barstow may have confused the two incidents, and I believe that Murphy's recollection as to this incident was more accurate than Barstow's.

⁸ As the Board held in *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975):

We long have recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act.

⁹ The testimony of Harrison and Murphy was substantially in agreement on this point.

¹⁰ These findings are based on the credited testimony of Murphy which was corroborated by truckdriver Richard Faulconer. Union Business Agent Cochran testified that Murphy might have said something about a driver coming in and wanting to keep the polls open so that the driver could vote. He also acknowledged that either he or Havenhill probably did say that they had agreed the polls would be open until 6 p.m. and no longer, and that they wanted the ballots counted right then and there.

¹¹ This finding is based on the credited testimony of Villavicencio. Respondent's plant manager, Wayne Norcross, also credibly testified that he heard Harrison say that he was glad he did not get to vote, and that it would show that he had nothing to do with inciting the Union. Harrison acknowledged that he told Villavicencio that because he did not vote he had a clean slate, and no one would know whether he voted for or against the Union.

that he told Harrison that Harrison could wait until after he voted before taking the load.

There was a great deal of testimony concerning whether or not Respondent could have reasonably expected Harrison to return from his trip in time to vote. However, speculation in that regard is not needed. Harrison made the trip and returned shortly after 6 p.m. Even according to his own testimony, the trip took longer than anticipated for two reasons. One was that the geography of the site where the concrete was to be poured was such as to take an unusually long time to unload. The second was that his return was delayed because he was following a logging truck he could not pass. It is reasonable to assume that if the two unexpected delays had not occurred he would have been able to return in time to vote.

Considering all of the above factors, I find that Respondent did not prevent Chris Harrison from voting.

IV. THE REPRESENTATION CASE

Conduct that occurs between the date of the filing of a petition and the date of an election can be considered in determining whether the election should be set aside. *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961). The petition in Case 20-RC-14603 was filed on April 24, 1978, and the election was held on June 7, 1978.

As found above, the evidence does not sustain the allegation that Respondent prevented an eligible employee from voting on the day of the election. I therefore recommend that that objection be overruled. However, the credited evidence does establish that in late May or early June 1978 Murphy violated Section 8(a)(1) of the Act by telling Harland that Respondent would probably have to sell out and close up if the employees selected the Union. In addition, the credited evidence establishes that Respondent violated Section 8(a)(1) by reinforcing prior threats to close or reduce the operation by having pictures taken of its trucks and other equipment in the presence of employees on June 5, 1978.¹²

In *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786 (1962),¹³ the Board held:

Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election. This is so because the test of conduct which may interfere with the "laboratory 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).

More recently the Board has indicated that a *per se* approach is not to be followed where the misconduct is of minimal impact. See *CBS Records Division of CBS, Inc.*, 223 NLRB 709, fn. 2 (1976). In the instant case the miscon-

duct occurred in the context of a small bargaining unit of approximately 19 employees. The vote was extremely close, with seven for the Union, eight against the Union, and three challenges. Respondent's conduct was serious and far reaching and cannot be considered *de minimis* in impact. I find that Respondent's conduct interfered with the free and untrammelled choice of the employees in the election, and I therefore recommend the election of June 7, 1978, be set aside, that Case 20-RC-14603 be remanded to the Regional Director, and that a new election be directed by the Regional Director at an appropriate time.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local 137 and Operating Engineers Local 3 are and each is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening Harland in late May or early June 1978 with the sale or close of the plant if its employees selected the Union to represent them.

(b) Threatening Barstow on about February 20, 1978, with the close or reduction in operations of the plant if its employees selected the Union to represent them.

(c) Threatening Mike Harrison on about March 8, 1978, with reduction in operations of the plant if its employees selected the Union to represent them.

(d) Reinforcing its prior threats to close or reduce the operations of the plant if its employees selected the Union to represent them, by having taken of its trucks and other equipment in the presence of employees on June 5, 1978.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except as is set forth above, the General Counsel has not established by a preponderance of the credible evidence that Respondent violated the Act.

6. By engaging in the conduct described above in paragraphs 3(a) and (d), Respondent has interfered with its employees' freedom of choice in the election conducted on June 7, 1978.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

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

¹² Neither of these matters was raised by the objections. However, matters litigated in a complaint case can form the basis for setting aside an election even though those matters were not raised by objections. *American Safety Equipment Corporation*, 234 NLRB 501 (1978); *Dawson Metal Products, Inc.*, 183 NLRB 191, 200 (1970), enforcement denied on other grounds 450 F.2d 47 (8th Cir. 1971).

¹³ See also *Leas & McVitty, Incorporated*, 155 NLRB 389 (1965).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁴

The Respondent, Anderson Cottonwood Concrete Products, Inc., Cottonwood, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with plant closure or a reduction in operations if they select Teamsters Local 137 and Operating Engineers Local 3 to represent them.

(b) Reinforcing prior threats to close or reduce its operations if its employees select said Unions to represent them, by having pictures taken of its trucks and other equipment in the presence of employees.

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

¹⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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

(a) Post at its Cottonwood, California, facility copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken the Company to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations in the complaint as to which no violations have been found are hereby dismissed.

IT IS FURTHER ORDERED that the election conducted on June 7, 1978, in Case 20-RC-14603 be set aside, that that case be remanded to the Regional Director for Region 20, and that a new election be directed by the Regional Director at an appropriate time.

¹⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."