

**Firestone Steel Products Company, a Division of Firestone Tire and Rubber Company and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Petitioner. Case 25-RC-6649**

March 23, 1979

**DECISION AND CERTIFICATION OF REPRESENTATIVE**

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election executed by the parties and approved by the Regional Director for Region 25 of the National Labor Relations Board on June 28, 1977,<sup>1</sup> an election by secret ballot was conducted in the above-entitled proceeding on July 28, under the direction and supervision of said Regional Director. Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Board's Rules and Regulations, Series 8, as amended.

The tally of ballots shows that there were approximately 425 eligible voters and that 409 ballots were cast, of which 207 votes were cast for and 154 against the Petitioner, and 48 ballots were challenged. The challenged ballots are not sufficient in number to affect the results of the election.

On August 4, 1977, the Employer filed timely objections to the election. Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation was conducted under the direction and supervision of the Regional Director, and, on October 31, 1977, he issued and duly served on the parties his Report on Objections and notice of hearing. In his report, he recommended that the Employer's Objections 1, 2, 4, 6, and 8 be overruled in their entirety and that Objection 3A be overruled only insofar as it relates to the Petitioner's alleged threats to force the Employer to discriminate against employees who did not support the Petitioner. The Regional Director ordered that a hearing be held with respect to the issues raised by Objections 3A, 3B, 5, and 7.

Thereafter, on November 28, 1977, the Employer filed timely exceptions to the Regional Director's report, requesting that the Board set aside the Regional Director's recommendation that Objections 2 and 6 be overruled and that these objections be included in the notice of hearing. The Petitioner filed an answering brief. On January 26, 1978, the Employer offered to submit additional evidence which previously had been unavailable in support of its exceptions. This evidence was accepted on January 30, 1978. On Feb-

ruary 6, 1978, the Petitioner filed a response to the Employer's offer of submission.

On March 31, 1978, the Board issued a Decision and Order directing hearing<sup>2</sup> in which it rejected the Employer's contention that certain of its employees, who were supporters of the Petitioner, were also agents of the Petitioner, and that statements made by them were objectionable within the context of Objections 2 and 6. Accordingly, the Board adopted the recommendations made by the Regional Director in his report and ordered the case referred to him for the purpose of arranging the hearing which he had directed with respect to the issues raised by Objections 3A, 3B, 5, and 7.

In the Regional Director's initial order directing a hearing, the scope of the issues so presented was defined with particularity. The hearing with respect to Objection 3A was to focus on whether any threats were made, authorized, or ratified by the Petitioner concerning the type of inducement used to persuade employees to sign authorization cards. The hearing on Objection 3A also was intended to cover similar threats not to represent employees who failed to support the Petitioner. Evidence concerning Objection 3B was to address the issue of whether the Petitioner or its employee supporters<sup>3</sup> threatened employees with physical harm if they opposed the Petitioner. Evidence taken with respect to Objection 5 was for the purpose of determining whether the election was conducted in an atmosphere of fear and violence as a result of the assembly of a group of persons at the entrance to the Employer's plant on the evening of the election, prior to the closing of the polls. Finally, as the allegations underlying Objection 7, with respect to statements made by the Petitioner's paid organizer and agent, also were considered by the Regional Director in his treatment of Objection 3A, no other specific instructions were added with respect to Objection 7.

Pursuant thereto, a hearing was held before Hearing Officer Brenda Michelle Robinson, and on October 4, 1978, the Hearing Officer issued and served on the parties her Report on Objections and Recommendations to the Board. Upon consideration of the evidence presented, the Hearing Officer recommended that Objections 3A, 3B, and 5 be sustained and Objection 7 be overruled. She further recommended that the election be set aside and a new election ordered.

Thereafter, the Petitioner and the Employer filed timely exceptions to the Hearing Officer's Report on Objections and Recommendations to the Board. Peti-

<sup>2</sup> 235 NLRB 548 (1978).

<sup>3</sup> Evidence of threats made by employees, although they were not agents of the Petitioner, was to be considered in connection with the allegation in Objection 5 that a general atmosphere of fear and violence existed at the time of the election.

<sup>1</sup> All dates are 1977 unless otherwise stated.

tioner excepts to the credibility resolutions made by the Hearing Officer and to the Hearing Officer's sustaining Objections 3A, 3B, and 5. The Employer excepts to the overruling of Objection 7 and to the Hearing Officer's failure to find, within the context of Objection 3A, that the Petitioner authorized or ratified threats made by employees to other employees regarding discrimination against employees who did not support the Petitioner.

Pursuant to the provisions of Section 3(b) 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 Employer's objections, the Hearing Officer's report, the exceptions, and the entire record in this case, and hereby concludes that the Employer's objections should be overruled in their entirety, and that a certification of representative should issue.

In summarizing the evidence in support of Objection 3A, the Hearing Officer recounted testimony concerning statements made by four employees who were supporters of the Petitioner, as well as statements made by Rex Wiseman, Petitioner's paid organizer. Credited testimony<sup>4</sup> indicates that during the course of the campaign the employee supporters made various statements for the express purpose of persuading employees to support the Petitioner and sign authorization cards.<sup>5</sup> However, as we have previously found that employee supporters of the Petitioner were not acting as agents on its behalf, such conduct is not objectionable under Objection 3A unless Petitioner made, authorized, or ratified such statements. The Hearing Officer found that no such authorization or ratification had occurred. Although Wiseman testified that he had instructed employee supporters that signing an authorization card was useful evidence of union activity, the Hearing Officer concluded that employees misinterpreted Wiseman's

<sup>4</sup> The Petitioner has excepted to the credibility resolutions of the Hearing Officer with respect to the statements made by these four employees. It is the established policy of the Board not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961); *Streich-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no sufficient basis for disturbing these credibility resolutions in this case.

<sup>5</sup> This testimony indicates that employees Douglas Abner, Ernie Walker, Jr., Alvie Stone, and Donald R. Hutchinson, at various times prior to the election, told other employees that if they signed an authorization card and were thereafter fired or laid off, they would receive the support of the Petitioner and would be reinstated. Other employees were told that they had better sign a card for their own good or that if they signed a card, they would be one of the first ones called back. Conversely, employees were told that if they did not sign a card they would be in trouble or would be sorry. At different times, employees were told that if they did not sign a card and were thereafter fired or laid off, they would not be called back; the Petitioner would not be able to get them recalled or know whom to call back; the Petitioner could not help such employees; or more generally, the Petitioner would not back them up.

remarks to mean that signing such a document was necessary in order to obtain protection against being laid off or discharged, and that they thereafter conveyed this misinterpretation without the Petitioner's authorization or ratification to other employees. Based on the finding of a misunderstanding in this regard, we adopt the Hearing Officer's finding that such statements by employee supporters of the Petitioner do not constitute objectionable conduct.

The Hearing Officer also found that during the course of the election campaign Rex Wiseman, the Petitioner's organizer, spoke at a meeting before employees. She credited employee Delores Soaper who, as stated in the Hearing Officer's report, testified that "Wiseman said something to the effect that if a person had not signed a card, the union would not help that person get his job back whether that person was fired for union activities or for any other purpose." Inconsistent with this finding with respect to Soaper's testimony, however, is the Hearing Officer's statement in her report with respect to the issues raised by Objection 7. In this section of the report she states, *in toto*:

The conduct complained of in Objection 7 has been discussed in connection with Objection 3B [sic], wherein it was found that Rex Wiseman did *not* tell employees at union meetings and other times, if they did not support [the Petitioner] by signing union cards and otherwise before the election, and the [Petitioner] became the collective bargaining representative, they would not be supported by the union in layoff and recall situation [sic], and in other ways, and would be thus discriminated against in a collective bargaining unit. [Emphasis supplied.]

As noted above, the Hearing Officer recommended that Objection 3A be sustained and Objection 7 be overruled.

Given such clearly inconsistent findings, our normal deference to a hearing officer's credibility findings is inapplicable in reviewing whether allegedly objectionable statements were made by Wiseman as testified to by Soaper. In the present situation, we are compelled to make an independent evaluation of the testimony.

In reexamining the evidence on record, we find that the Hearing Officer, in paraphrasing the testimony of Delores Soaper, failed to provide the complete context within which Soaper gave her responses. On cross-examination, the relevant part of the record contains the following material:

Employer's Counsel: Do I understand that Mr. Wiseman said at the union meetings that if they had signed a union card and they were laid

off that the union—laid off or fired, that the union may help them get their jobs back?

Soaper: Yes

Employer's Counsel: Did he state the opposite of that, that if they had not signed a union card and were laid off or fired that the union would not be able to help them get their job back?

Soaper: Not to my knowledge. I mean, from what I can remember, he said that if you did sign the card and you happened to be fired for union activities that the union would assist you in getting your job back.

Employer's Counsel: And then did you understand from what he said, everything that he said, that if you had not signed the card that the union would not help you get your job back, whether you were fired for union activities or for any other purpose?

Soaper: I think it was something to that effect that he said.

On the other hand, Wiseman, in denying that he ever told employees that the Petitioner would not support them if they did not sign authorization cards, testified as follows:

Petitioner's Counsel: Did you at any union meeting tell employees that if they signed a union card the union would give them their support but if they didn't sign a union card the union would not bother with them?

Wiseman: No, I did not say that.

Petitioner's Counsel: Did you ever say anything like that?

Wiseman: I never said anything near like that. The only thing that I said is, if you are fired for union activities it is helpful if you have some kind of documentary evidence, and a union card, along with other things, could be used as documentary evidence. That's the only advantage you have between signing a card and not signing a card.

In determining which witness gave the more accurate description of what was said by Wiseman in the presence of Soaper, the conflict herein lies between Wiseman's unequivocal denial that he never threatened employees at meetings that the Petitioner would withhold support from employees should they fail to sign a union card and Soaper's recollection that she thought that he had said something to that effect. Furthermore, this latter statement came in response to an inquiry as to what she did "understand from what [Wiseman] said, *everything* that he said." (Emphasis supplied.) In addition, even this vague agreement with the questioner was elicited only after a repetition of a leading question, with the first response

being a denial of the particular statement hypothesized by the questioner.

It therefore appears that Soaper's testimony does not constitute direct evidence as to what specifically was said by Wiseman, but rather was at most her subjective interpretation of the entirety of Wiseman's comments to the employees. As such, we do not consider Soaper's recollection to be a foursquare contradiction of Wiseman's denials. Furthermore, it appears that the more likely explanation for the lack of congruity between Soaper's recollection and Wiseman's denials resides in the analysis presented by the Hearing Officer for her finding that Petitioner did not authorize or ratify similar statements made by employees as outlined in footnote 5 above.<sup>6</sup> In that context, as noted above, the Hearing Officer concluded that the employees misunderstood Wiseman's remarks concerning the value of documentary evidence of union support, which in themselves are not objectionable. Consequently, we credit Wiseman's denials that he had made the statements attributed to him by Soaper. Furthermore, we find that the credited testimony of Ernie Walker with respect to his recollection of statements made by Wiseman is not evidence of any objectionable conduct. Walker testified that Wiseman had told employees that after the Petitioner came in, persons who supported and worked for the Petitioner would receive help in getting their jobs back if they were discharged, and that he would not run off and leave them. Walker's testimony indicates merely that Wiseman promised continued support for supporters of the Petitioner if they were discharged, and this is in no respect threatening.<sup>7</sup> Accordingly, we find that the evidence does not support a finding that

<sup>6</sup> These statements, found not to have been authorized or ratified by the Petitioner, included assertions that the Petitioner would not support or help employees who failed to sign authorization cards.

<sup>7</sup> In crediting the testimony of Soaper and Walker, the Hearing Officer also noted that their testimony was corroborated in part by the testimony of Harper and Fletcher, but refrained from otherwise crediting the testimony of the latter two witnesses. Given that the Hearing Officer failed to credit independently the testimony of Harper and Fletcher, and the Employer in its exceptions has failed to except specifically to this limited finding, we need not consider what effect their testimony, if independently credited, would have on the merits of Objections 3A and 7. Nevertheless, assuming *arguendo* that this additional testimony was independently credited, our conclusions would not be affected. We note that Harper prefaced his testimony, both on direct and on cross-examination, with the *caveat* that it was the "essence" of what Wiseman had said or let him know. After being advised to state as well as he could what was said, he stated, "If we hadn't signed a Union card, that they [the Petitioner] would not give us their support in getting our jobs back." As this statement allegedly came in the context of a discussion of the case of another employee who was discharged during the organizing campaign for the stated reason of absenteeism, it appears that Wiseman's statement was again, without more, specifically addressed to the problems of documentary evidence of union activity for those employees who subsequently encountered possible discriminatory retaliation. Likewise, Fletcher's account that Wiseman said that he had no use for those who did not sign cards, when coupled with his additional testimony that the comment came during a discussion of union support for those faced with "trouble" from the Employer, yet again appears to reflect no more than an expression of the futility of alleging discrimination absent proof of union support.

the Petitioner made, authorized, or ratified threatening statements to employees within the scope of Objections 3A and 7.

In her treatment of the evidence in support of Objection 3B, relating to whether the Petitioner or its employee supporters threatened employees with physical harm if they opposed the Petitioner, the Hearing Officer concluded that on two occasions employees made such threats.<sup>8</sup> The Hearing Officer found that the first incident occurred on July 15, about 2 weeks before the election. According to the evidence, employee Frank Hamilton was with a group of other employees at the plant's entrance. As employee James Hendrick tried to drive his car through the entrance, the group stood in front of his car blocking his entry. Hamilton came over to the driver's side of the car and faced Hendrick. Hendrick's window was shut at the time, and there is no evidence that either person spoke to the other. At that point Hamilton struck the driver's window with his fist, and Hendrick responded by quickly driving through the entrance. The window of the car did not break and there is no evidence of any damage to the car.

The Hearing Officer's conclusions with respect to the second incident are based exclusively on the testimony of employee Steve Newman. According to Newman, he was told by employee Bobby Winstead on the night of the election that the latter had been run off the road the previous night as he was driving his truck home from a company picnic. Doug Abner, an employee who supported the Petitioner, was identified as the person responsible for the incident, but it was not reported that Abner said anything to Winstead in relation to the incident.

The Hearing Officer found that these two incidents contributed to the creation of an atmosphere of fear, confusion, hostility, and violence.<sup>9</sup> We disagree. In each of these two incidents, there is no report that either of the two employees accused of the misconduct said anything which would have directly connected their behavior with the election campaign. The fact that Hamilton and Abner were otherwise known to support the Petitioner is not sufficient, in itself, to establish that the reported acts impermissibly tainted the atmosphere surrounding the election. Furthermore, the Hearing Officer improperly concluded, based solely upon Newman's testimony, that Abner ran Winstead's truck off the road. At the hearing, the

<sup>8</sup> In addition, the Hearing Officer found that two other alleged threats either did not occur or were unrelated to the union sentiments of the participants. No exceptions have been filed relating to her finding that no objectionable conduct occurred in those instances. Furthermore, no evidence was received regarding any such threats being made by the Petitioner or its agents.

<sup>9</sup> For further discussion of this finding, see the analysis with respect to Objection 5, *infra*.

Petitioner objected to Newman testifying with respect to what Winstead had told him in relation to this incident because it had not been established that the incident had occurred. The Hearing Officer, in ruling that such testimony was admissible, noted that the testimony was addressed to rumors circulating at the plant during the election. As this evidence was not admitted to show the truth of the matter stated, the Hearing Officer was not warranted in so concluding. Consequently, we conclude that Objection 3B is without merit.

With respect to the final outstanding objection, Objection 5, the Hearing Officer concluded that the conduct of a large gathering of employees located at the entrance to the Employer's premises on the night of the election created an atmosphere of fear, confusion, hostility, and violence that rendered a free expression by the employees of their choice in the election impossible.<sup>10</sup> For the reasons stated below, we disagree with this conclusion.

The election in the instant proceeding occurred on July 28, with the voting periods split into two sessions. The first session lasted from 1 p.m. to 3:15 p.m., and there is no allegation that any misconduct occurred during this time. The second voting session lasted from 10 p.m. to 12:30 a.m. At the beginning of the second session, the Employer's second-shift employees, numbering approximately 125 out of a work force of about 450 employees, were present in the plant, having begun their shifts earlier in the day. During the course of the second voting session, second-shift employees finished their shift and left the plant. Concurrently, a similar number of third-shift employees, whose reporting time varied between 10:30 and 12 p.m., arrived at the plant. The bulk of the third-shift employees, however, was due to report by 11 p.m. It appears that employees were released from work in groups so as to be able to vote in the election.

On the evening of the election, commencing about 8:30 p.m., a crowd began to gather at the plant entrance which leads to the parking lot and is located approximately 200 yards from the plant buildings. Although reports of the size of the crowd varied, the Hearing Officer found that 20 to 25 people were at the entrance at 10 p.m. and that the number increased to 75 to 100 at 1:30 a.m., an hour after the polls had closed. Estimates given as to the number of persons at the plant entrance after 12 p.m. and before the polls closed ranged from 30 to 80. The testimony indicates that some of those at the entrance stood in the roadway, held signs, and leafleted cars that drove by them. While this activity might have caused cars

<sup>10</sup> The Hearing Officer concluded that the evidence in support of Objection 5, independent of as well as in conjunction with the evidence of threats in support of Objection 3B, warranted setting aside the election.

to slow down or stop momentarily, there is no evidence that access to or egress from the plant was otherwise interrupted during the course of the evening. Further evidence shows that, as the evening progressed, the crowd became increasingly noisy and that persons would cheer or boo cars as they drove by.

The Hearing Officer credited the testimony of the Petitioner's organizer, Wiseman, who stated that he was present at the entrance three times on the evening of the election—once at 9:45 p.m. prior to the reopening of the polls, once upon leaving the plant after the polls had opened, and the third time at 12:30 p.m. at the closing of the polls. Although he spoke with persons at the plant entrance, the credited testimony indicates that he did not leave the car at these times, and that he spoke briefly to the persons assembled there.

Third-shift employees who entered the plant prior to their shift circulated reports that a crowd had gathered at the plant entrance. Other employees saw the activity at the plant entrance from doors to the plant closest to the entrance, and additional employees had a chance to observe the crowd when they would walk out of the plant while on a workbreak. Finally, second-shift employees passed the crowd upon leaving the plant. There is no evidence to indicate that the sounds emanating from the plant entrance were heard in the polling area, which was on the far side of the plant from the entrance and out of view.

We do not agree with the Hearing Officer that the evidence in support of Objection 5 warrants setting aside the election. Evidence of electioneering and of crowds assembled while an election is being conducted does not, in itself, constitute objectionable conduct. *Sewanee Coal Operator's Association, Inc.*, 146 NLRB 1145 (1964). Furthermore, a close examination of the record does not reveal that persons in the crowd engaged in activity which impermissibly interfered with the election atmosphere. Although the Employer called many persons to testify in support of its objections, not one of them was a third-shift employee who had to pass through the entrance on the night of the election. Of those persons who did testify, almost all of their testimony related to what they observed from outside the plant building located approximately 200 yards from the entrance, or what they saw on leaving the plant premises after 12 p.m., after they had voted. Although several employees testified that they saw beer cans being thrown, this evidence is likewise limited to observations made either from the plant or as employees were leaving the premises after 12 p.m. that evening, after all third-shift employees were scheduled to report to work. We find employees' observations made at night concerning conduct which took place 200 yards from them at

the plant's entrance to be of limited value. Consequently, we find the generalized testimony that beer cans were thrown at the entrance during the course of the evening is insufficient to warrant a finding that employees were coerced or threatened as they entered the premises. Moreover, as the remaining testimony related to a beer can being thrown at cars on two occasions after 12 p.m. while those cars were leaving the plant, this testimony does not establish evidence of interference with the election. By that time all third-shift employees were scheduled to be inside the plant, and there has been no showing that employees who had not yet voted saw or were made aware of these incidents. Furthermore, additional evidence that shouting and electioneering occurred at the entrance prior to the close of the polls may not constitute objectionable conduct absent a showing that such activity was audible at the polls. No such showing has been made in this case.

Further evidence supports our finding that the activity which occurred at the entrance did not interfere with the election. Although, from the leafleting and other activities of the crowd, it appears that persons in the crowd generally supported the Petitioner, there is no evidence that the gathering had been formally organized by Petitioner or its adherents. Wiseman's brief presence at the plant entrance on these occasions, while entering or leaving the plant, also does not show that he directed, authorized, or condoned their presence at the time. Moreover, there is evidence that some of the participants had arrived in anticipation of being able to observe the counting of the ballots after the polls closed, which had been the Employer's initial position.<sup>11</sup> In any event, the mood of the crowd was not cast in a singularly ominous tone, as it appears that at least some had come to celebrate what they considered to be a successful organizing campaign. That this was the context is revealed by the testimonies of witnesses called by the Employer. Phillip Fletcher called the assembly a "party;" Michael Walden described the crowd at the entrance as "laughing, hollering and carrying on," and James Price stated that those at the entrance appeared to be whooping and hollering, playing music on radios, and "just having a good time." Furthermore it appears that the crowd was not made up exclusively of employees, as it appears that children were also present among the adults.

While the Hearing Officer cited additional testimony of events that were observed after employees had voted and as they were leaving the plant, we find such conduct did not interfere with the election

<sup>11</sup> On the evening of the election, the Employer's attorney advised Wiseman that employees would not be able to enter the plant to observe the counting of ballots, contrary to earlier indications.

where, as here, there has been no showing that such activities were observed by employees who had not yet voted.

Based on the above, it does not appear that the conduct of persons gathered at the plant's entrance on the night of the election created an atmosphere of fear, confusion, hostility, or violence. We therefore conclude that the evidence presented in support of Objection 5 lacks merit and that this objection is overruled.

Accordingly, as we have overruled the Employer's objections in their entirety<sup>12</sup> and the tally of ballots shows that the Union has received a majority of the valid ballots cast, we shall certify it as the exclusive bargaining representative for the employees in the appropriate unit.

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<sup>12</sup> We also reject the Employer's request that we find merit in its Objection 6, which has been previously overruled, on the ground that, in accord with our previous ruling, the evidence in support of Objection 6 lacks merit.

### CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the appropriate unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

All production and maintenance employees, including janitors, inspectors, leadmen, plant clerical employees (timekeepers, maintenance clerk, shipping clerk, receiving clerk), engineering assistants and laboratory technician; but excluding all office clerical employees, the payroll clerk, guards, professional employees, nurses, department managers, foremen, and other supervisors as defined in the Act.