

**Alson Manufacturing Aerospace Division of Alson Industries, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 509.**  
Case 21-CA-12363

July 11, 1977

**SUPPLEMENTAL DECISION AND ORDER**

**BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO**

On June 24, 1974, the National Labor Relations Board issued its Decision and Order<sup>1</sup> in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, as amended, by refusing to bargain with the Union certified by the Board in Case 21-RC-13252. The Board ordered Respondent to cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit.

On September 15, 1975, the United States Court of Appeals for the Ninth Circuit denied enforcement of the Board's Order and remanded the proceeding to the Board for a full evidentiary hearing as to the validity of Respondent's objections to the election held June 28, 1973.<sup>2</sup>

Pursuant to the aforesaid order of remand, a hearing was held before an Administrative Law Judge where Respondent was afforded full opportunity to present evidence and to examine witnesses.<sup>3</sup>

On March 11, 1977, Administrative Law Judge Stanley Gilbert issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions<sup>4</sup> of the Administrative Law Judge and to adopt his recommendation that the Board reaffirm its prior Decision and Order reported at 211 NLRB 876 (1974).

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts the recommendation of the Administrative Law Judge to affirm the Decision and

230 NLRB No. 114

Order as reported at 211 NLRB 876 (1974), and hereby orders that the Respondent, Alson Manufacturing Aerospace Division of Alson Industries, Inc., Gardena, California, its officers, agents, successors, and assigns, shall take the action set forth in the said Decision and Order.

<sup>1</sup> 211 NLRB 876. On July 30, 1974, the Board denied Respondent's motions for reconsideration. See 212 NLRB 662.

<sup>2</sup> 523 F.2d 470.

<sup>3</sup> The Union did not enter an appearance at the hearing, although it received due notification that the hearing was to be held. After diligent but unsuccessful attempts were made to contact the Union, the Administrative Law Judge proceeded in its absence.

<sup>4</sup> Chairman Fanning and Member Jenkins, in agreement with the Administrative Law Judge, find that Respondent's allegations that the Union made certain objectionable material misrepresentations are without merit. See their dissent in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), and Member Jenkins' further dissent in that case.

Member Penello agrees that Respondent's allegations of material misrepresentations are without merit but reaches this conclusion on the basis of the standards set forth in *Shopping Kart Food Market, Inc.*, *supra*.

**SUPPLEMENTAL DECISION**

(Report on Objections to Election)

STANLEY GILBERT, Administrative Law Judge: On July 6, 1976, the Board issued in the instant case its "Order Remanding Proceeding to Regional Director for Hearing." Said order reads as follows:

On June 24, 1974, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,<sup>1</sup> finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordering that the Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices.

On July 30, 1974, the Board denied the Respondent's Motions for Summary Judgment seeking to reopen the proceedings in Case 21-RC-13252 based on an alleged lack of a Board quorum and requesting a hearing on its objections to the election in those proceedings.

Thereafter, the Respondent filed with the United States Court of Appeals for the Ninth Circuit a petition for review of the Board's Order and the Board filed a cross-application for enforcement of the Order. On September 15, 1975, the Court denied enforcement and remanded the case to the Board for a full evidentiary hearing as to the validity of the Respondent's objections and for certification.

The case having thus been remanded to the Board,

IT IS HEREBY ORDERED that a hearing be held before an Administrative Law Judge to be designated by the Chief Administrative Law Judge, Division of Judges, for the purpose of taking evidence in accordance with the Court's remand.

IT IS FURTHER ORDERED that this proceeding be and it hereby is, remanded to the Regional Director for Region 21 for the purpose of arranging such hearing, and that the Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that, upon the conclusion of such hearing, the Administrative Law Judge shall prepare and serve upon the parties a Decision containing findings of fact based upon the evidence received, conclusions of law, and recommendations, and that following service of the Decision upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended shall be applicable.

<sup>1</sup> 211 NLRB 876.

In accordance with the above Order a hearing was held in Los Angeles, California, on November 9, 1976, before me. Appearances were entered upon behalf of the General Counsel and Respondent,<sup>1</sup> but no appearance was entered on behalf of the Charging Party (Union). The only brief filed with me after said hearing was that of Respondent which was received on December 14, 1976.

It is noted that in its opinion accompanying the judgment remanding this case to the Board for a "full evidentiary hearing as to the validity of Alson's objections and for certification," the court of appeals stated:

It appears to be the position of the Board that the allegations made in the objections and in the affidavits filed in support thereof, if fully credited, could not have materially affected the election outcome. We disagree.

Alson's objections raised issues of fact as to (1) whether the Union falsely and maliciously accused Alson of dishonesty in dealing with its employees and misrepresented the Union's remedies in regard thereto; (2) whether the Union made or condoned widespread threats of violence against Alson's employees; (3) whether the Union misrepresented Alson's profits; (4) whether the Union electioneered at or near the polls during the election; and (5) whether the Union falsely denied the existence of a collective bargaining contract between it and another employer. [Factual issue numbers added.]

The only witnesses were those called by Respondent, and, since their testimony is uncontradicted and credible, it is credited. It is noted, however, that no testimony was introduced which can be related to the issues of fact numbered (3) and (5) referred to in the above-quoted excerpt of the court's opinion, and that, on the other hand, testimony was adduced relating to Objection 4 which was not referred to in said opinion of the court.<sup>2</sup> While said Objection 4 was not referred to in the court's opinion I am not wholly persuaded that by the court's judgment and opinion it intended to limit the hearing on objections strictly to the above five factual issues it outlined.<sup>3</sup>

Inasmuch as no testimony was introduced with respect to factual issues numbered (3) and (5) and no mention was made with respect to them in Respondent's brief, it is

<sup>1</sup> Respondent is now known as Alson Manufacturing, Inc.

<sup>2</sup> Objection 4, in essence, was a statement made to employees by a representative of the Union that certain classifications of employees could not vote because they had not signed union authorization cards.

<sup>3</sup> It is noted that in its brief that Respondent relied on the factual matter relating to Objection 4. It is further noted that the testimony relating thereto involves the same incident (a meeting with the employees) which is the basis

concluded that the objections to the election which relate to said issues of fact have not been sustained.

#### Scope of the Remand

As noted above, the court outlined the issues of fact which it considered to be raised by Respondent's objections and shortly thereafter the court stated: "It is our view of the record that if the facts contended for by Alson are found to be true, the election should be set aside." Apparently based upon this statement, Respondent argues, "The law of this case is that the Objections of Alson are sufficient to set aside the election if supported by evidence." It is respectfully submitted that I do not interpret the court's statement to mean that if some of the "facts" contended for by Alson before the court are found in the record before me, the election must be set aside. Rather, I believe that the court intended that if the *conclusionary statements* set forth in its outline of the issues of fact be proved in this proceeding the election should be set aside. However, it is far from clear that such a result would follow if only some portion of said conclusionary facts were proved. Moreover, I do not believe that by its remand the court intended to restrain the Board from considering whether the facts proved in this proceeding had a sufficient impact upon the election to warrant setting it aside. Consequently, I am setting forth hereinbelow the findings of fact relating to the issues of fact numbered (1),<sup>4</sup> (2), and (4),<sup>5</sup> and my conclusions, not only as to whether they support the conclusionary facts, but also as to whether they constitute a sufficient basis for setting aside the election.

#### Factual Issue No. (1)

This issue, as stated by the court, is "whether the Union falsely and maliciously accused Alson of dishonesty in dealing with the employees and misrepresented the Union's remedies in regard thereto."

The testimony relating to this issue is all with respect to statements made by union representatives at a meeting they held with 20 to 25 employees on June 27, 1973, the day before the election. The employees had received a letter that day from Respondent which raised certain questions and supplied some answers. The pertinent portions of the letter are as follows:

Question No. 1—Do you want to retain your American right to make your own way on your own ability, to obtain pay increases, promotion and success by hard work and by being better than the other fellow, or do you think you will be better off if the Union officials decide who gets increases in pay, who gets promotions, who gets overtime pay and how much, and who gets laid off during slow business periods, which no one can control?

for factual issue numbered (1) set forth in the court's opinion. In the circumstances, therefore, the subject matter of Objection 4 will be considered as part of "Factual Issue No. (1)" hereinbelow.

<sup>4</sup> Expanded as noted hereinabove to include Objection 4.

<sup>5</sup> As noted hereinabove, no testimony was adduced relating to issues of fact numbered (3) and (5).

Question No. 2—If the Union wins the election and calls a *strike*, how are you or your family fixed if your income suddenly stops?

Question No. 3—What is the right of an employee to get his job back after a strike? AN EMPLOYEE THAT HAS BEEN OUT ON STRIKE CAN GET HIS JOB BACK WHEN THE STRIKE ENDS PROVIDING HE HAS NOT BEEN REPLACED. THIS APPLIES WHERE THE STRIKE IS OVER WAGES AND FRINGE BENEFITS. THE EMPLOYER CAN REFUSE TO REINSTATE STRIKERS IF THEIR JOBS HAVE BEEN FILLED AND HE NEED NOT TERMINATE THE REPLACEMENT WORKERS HIRED DURING THE STRIKE.

Question No. 4—Can the Union guarantee increased wages, vacations, holidays, and other benefits? NO! REMEMBER A UNION CONTRACT CAN COVER A GREAT DEAL OR VERY LITTLE, DEPENDING UPON HOW MUCH THE EMPLOYER AND THE UNION CAN WORK OUT BETWEEN THEMSELVES.

Question No. 5—Can the Union impose stiff fines and assessments? YES! WHEN OR HOW MUCH DEPENDS UPON THE CONSTITUTION AND BY-LAWS OF THE UNION.

Question No. 6—Does the Union bring seniority in if they are elected? IT DEPENDS ENTIRELY UPON WHAT THE EMPLOYER AND THE UNION CAN AGREE TO IN THE UNION CONTRACT.

Question No. 7—Can the Union prevent layoffs for lack of work? NO! IF THE COMPANY HAS LESS BUSINESS AND CONSEQUENTLY LESS WORK TO BE PERFORMED, THEN LAYOFFS CANNOT BE PREVENTED.

Question No. 8—If any employee is now making more than Union scale for work performed and the Union is voted in and the Union scale is lower than the employee is now making, will the employee have to take a pay cut? WHAT AN EMPLOYEE GETS OR DOES NOT GET DEPENDS ON WHAT THE EMPLOYER AND THE UNION CAN AGREE TO IN THE UNION CONTRACT. IT WOULD NOT BE GOOD BUSINESS FOR THE COMPANY TO PAY MORE THAN THE SCALE NEGOTIATED WITH THE UNION.

Employee Sammie Baker testified that a union representative named Peterson discussed the letter with employees. Baker's testimony is as follows:

Well, he said the letter was all lies and that then we wanted then to know if the letter were all lies, why couldn't they go to the Labor Board and have the thing forfeit?

JUDGE: What?

THE WITNESS: You know, with the election because the company was lying. He made the statement that the company could tell us anything they wanted within 24 hours of the election and there wasn't a thing they could do about it. And then we mentioned if it is all lies, why don't you go through it, and that is how he proceeded to go through the letter to verify if it was lies and why they were lies.

He went item by item. There was a lot of questions being asked. Maybe he skipped something, but the one he draw my attention to was number 5 here.

<sup>6</sup> It is noted that the Regional Director in ruling on the merit of Respondent's objections relied to some extent upon material (apparently

Q. (By Mr. Burke) What is that?

A. About the imposed stiff fines and assessment and he stated that it was impossible for that to happen and I questioned him on it because it happened to me at North American when Ford was on strike, I think that was in '66 or '67 and they assessed me twice.

JUDGE: May I see what you are talking about? Oh, I have a copy here.

THE WITNESS: Number 5, and then he said, "Well, I remember the incident, but it never could happen again."

Unfortunately, there is nothing in the record to indicate what Peterson's explanation was to the employees as to why the statements (other than "number 5") in the letter were lies, since no appearance was entered on behalf of the Union and, therefore, no witnesses were called by it.<sup>6</sup>

Respondent, quite correctly, argues that the principles set forth in *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962), should be applied to the facts contained in Baker's testimony. The Board, on page 224 of said Decision, sets forth said principles:

We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not,<sup>8</sup> may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside.<sup>9</sup> Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if its finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have had a *de minimis* effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion. Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements.<sup>10</sup>

<sup>8</sup> To the extent that they are inconsistent with this decision, we hereby overrule those cases which suggest that the misrepresentation must have been deliberate.

<sup>9</sup> We are not, of course, considering in this context statements which may be reasonably construed to contain a threat of reprisal or force or promise of benefit. If the Board concludes that a statement carries such a threat or promise, it is not a defense that the message was equivocally phrased, and the election will be set aside. See *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782.

contained in an affidavit or affidavits supplied by the Union) which is not in evidence in the record before me.

<sup>10</sup> See, for example, *Allis-Chalmers Manufacturing Company*, 117 NLRB 744, 748; *Hook Drugs, Inc.*, 119 NLRB 1502, 1505. In evaluating the probable impact of a party's statement on the election, one factor which the Board will consider is whether the party making the statement possesses intimate knowledge of the subject matter so that the employees sought to be persuaded may be expected to attach added significance to its assertion.

The Company's letter consisted of antiunion propaganda and the Union's labelling the statements therein as falsehoods, to my mind, constituted counterpropaganda and does not support the conclusionary fact that "the Union falsely and maliciously accused Alson of dishonesty in dealing with its employees." By its counterpropaganda the Union did not accuse Respondent of having engaged in dishonest conduct in its *treatment* of its employees, as indicated in the conclusionary allegation of fact. Thus, cases such as *Jobbers Warehouse Service, Inc.*, 210 NLRB 1038 (1974), and *Bor-Ko Industries, Inc.*, 181 NLRB 292 (1970), in which the objections were sustained, are not applicable to the facts herein. In the first cited case the union accused the employer of lying when it said it was innocent of unfair labor practices and in doing so the union seriously misrepresented the substance of the unfair labor proceedings involving the employer. In the second cited case the union accused the employer of "cheating" its employees on overtime pay. In both cited cases the accusations reflected upon the employer's integrity in *dealing* with its employees, rather than merely accusing the employer of false propaganda. Thus, I am of the opinion that the conclusionary fact alleged has not been sustained by the evidence and applying the guidelines set forth in *Hollywood Ceramics*, I am led to conclude that the statement that the Company's letter was all lies is not a sufficient basis for setting aside the election. See also *Stimson Lumber Company*, 224 NLRB 567 (1976); and *Hill Road Convalescent Hospital, Inc.*, 217 NLRB 460 (1975).

Also in issue of fact numbered (1) is the allegation that the Union "misrepresented" its remedies in regard to the "lies" contained in the letter. According to Baker's testimony the union representative stated "that the company could tell us anything they wanted within 24 hours of the election and there wasn't a thing they could do about it." This statement was apparently a reference to the rule in *Peerless Plywood Company*, 107 NLRB 427 (1953), and, while it is an overly simplistic statement thereof, I am unable to ascertain how it could have had any impact on the election. *Hollywood Ceramics, supra*.

As stated hereinabove, although it is not included in any of the issues of fact set forth by the court, Respondent nevertheless urges as a basis for setting aside the election statements made at the meeting which were testified to by Steven Mathovich. According to his testimony a union representative stated that the "inspectors" would not be able to vote because they had not signed a "green card" which he understood to be a union authorization card.<sup>7</sup> Mathovich's testimony continues as follows:

<sup>7</sup> Although there is nothing in the record before me as to the color of the union authorization cards, it is noted that in the Regional Director's report on the objections he noted that investigation disclosed that the union authorization cards were "white." However, I am not relying upon this in considering Mathovich's testimony.

Yes. I asked him why the inspectors couldn't vote because they didn't sign a card. I said I didn't sign a card, how come I can vote.

Then he stated "I have one in my car, would you like to sign it?"

I was kind of stunned and I said, "Yeah, I will sign it" because I was under the impression I might not be available to vote and then Tio Vasquez said he had one in his car and they went to get them, but they never came back with them and that was when the meeting was breaking up and I left.<sup>8</sup>

Mathovich also testified that he voted at the election, but that his vote was challenged by the union observer, ostensibly, however, because he "was a working leadman at that time." The aforesaid report on the objections discloses that there were approximately 51 eligible voters and that 50 votes were cast (of which 6 were challenged). Thus it appears that the statement attributed to the union representative about not being able to vote without signing a green card did not have the effect of causing eligible voters from casting their ballots including Mathovich (since 50 out of 51 eligible voters cast ballots). Therefore, it appears that the statement cannot be said to have had any impact on the election.

Respondent in its brief argues that the rule in *N.L.R.B. v. Savair Manufacturing Company*, 414 U.S. 270 (1973), should be applied to the above-mentioned statement in this case; that in the cited case the court ruled that the Union's offer to waive initiation fees for those who signed authorization cards prior to the election violated the conditions of employees' free choice, by allowing the Union to buy endorsements and paint a false portrait of support during its election campaign, and some employees who sign authorization cards may feel obliged to vote for the union in accordance with the pledge of support on the authorization card. Respondent further argues in its brief, "Certainly in this case the Union, by indicating that only those who had signed authorization cards could vote, improperly created a false impression of support for the Union by those who may have signed cards to vote." The facts in the *Savair* case are so dissimilar to the instant case, that I cannot consider it to be a precedent applicable herein. As to its last above-quoted argument, I am of the opinion that the employees could not have reasonably believed that it was necessary to sign a union authorization card in order to vote and, therefore, the false impression which Respondent contends was created by the statement could not have been created.

In view of the above findings and conclusions, I am of the opinion that the evidence does not support the conclusionary facts set forth in factual issue numbered (1). *Comfort Slipper Corporation*, 112 NLRB 183, 184-185 (1955).

<sup>8</sup> Although Mathovich appeared to be a credible witness, I am of the opinion that he must have misunderstood what was said to him about an employee not being eligible to vote if he had not signed a green card. But, since this would be speculation on my part, I do not rely upon it.

## Factual Issue No. (2)

This issue, as stated by the court, is “whether the Union made or condoned widespread threats of violence against Alson’s employees.”

Mathovich further testified as follows with respect to the meeting with the union representatives on the day before the election:

Q. Did you ask questions, other questions at that meeting?

A. Yes.

Q. Did anyone ever say anything to you about asking questions?

A. Two Spanish-speaking fellows, Tio Vasquez and Manuel Real. I asked a question or made a statement and they got quite upset. I was sitting on a bench and they moved around behind me and they were both speaking in Spanish and they seemed to be quite irritated.

Nothing happened then.

The next day I was informed, that was the day of the election by Oscar Rod that I came this close to getting my ass kicked at the Union meeting or at the meeting at the park because they didn’t like the questions I asked.

Q. Were there other employees present at that meeting who were Spanish speaking?

A. Yes.

Q. How many would you say out of the 20 or 25 were Spanish-speaking employees?

A. I’d say probably at least half of them.

Q. Before the election were you ever told that something could happen to you or others if the Union lost?

A. No.

Baker testified to a conversation he had with employee Manuel Real on the day before the election as follows:

He was talking about the union, you know, he said, “Tomorrow is the day,” something to that, and I was telling him, you know, don’t go out on a limb and don’t get himself up too high because they might or might not win and, you know, don’t make it too obvious, stuff like that, and he told me that, well, more or less is in the bag and anybody that, you know, don’t vote for the union and he drew a cross and he said J.C. and I didn’t understand what he was talking about so he drew a cross on the table where I worked like a crucifical cross.

He said this could happen to them. This is the impression I got. He didn’t say it in those words.

In its brief Respondent also relied on the testimony of Telesforo Perfecto Alvarez in support of its position on this issue. Alvarez testified that he is a “cavity mill operator”; that about 3 weeks prior to the election a fellow employee asked him to sign a union authorization card which he refused to do; that nothing was said to him about not signing a card; that after his refusal his machine was

tampered with several times by someone which made it difficult to operate the machine; that at times “they” would place a picture of a naked lady “on the top of the clock and say that that was Perfecto’s sister”; and when he returned from the washroom he would find his cutters missing. He further testified that he did sign a card about 3 days after he had refused to sign one; that the harassment nevertheless continued but “in a much lighter fashion”; that no one ever threatened him; and that no one ever told him the harassment occurred because he was opposed to the Union.

There is nothing in the record to support a finding that the Union instigated or condoned any of the incidents related by Mathovich, Baker, or Alvarez. Although the incident related by Mathovich occurred at a meeting which was being conducted by union representatives, there is no basis for inferring that they heard, or understood, what was said in Spanish by the two employees who were behind Mathovich. All that Mathovich could testify to was that the two employees appeared to be “quite irritated” by a question he asked or statement he made. The only evidence that their conduct was threatening in nature is hearsay testimony<sup>9</sup> (which I find to be of no probative value) of what was told him by another employee the next day which, in any event, was no more than an opinion.

As to the incident related by Baker, in view of the language barrier between him and Real, it is not clear that Baker clearly understood what Real said or intended to say, and in any event it was unaccompanied by any physical action and was an isolated incident which cannot be reasonably construed as having had any substantive impact on the election. As for the harassment of Alvarez, it was unaccompanied by threats or any indication to him that it was motivated by his refusal to sign a card. While it may be inferred that it was so motivated by the timing, that inference is somewhat diminished by its continuation after he signed a card even though he claimed it was in a “much lighter fashion.” In any event his harassment lends little support to Respondent’s position with respect to factual issue numbered (2).

Not only is there no testimony to support the allegation that the Union “made or condoned” the incidents to which the three witnesses testified, but also, in my opinion, the above three incidents hardly constitute “widespread threats of violence,” and are not of sufficient magnitude to have so interfered with laboratory conditions as to warrant setting aside the election, as contended by Respondent. The cases cited by Respondent in support of its contention, *Cross Baking Co. v. N.L.R.B.*, 453 F.2d 1346 (C.A. 1, 1971), and *N.L.R.B. v. Griffith Oldsmobile, Inc.*, 455 F.2d 867 (C.A. 8, 1972), fail to do so.

In view of the above analysis of the incidents relating to factual issue numbered (2), I am of the opinion that Respondent has failed to sustain the conclusionary facts set forth therein.

<sup>9</sup> Since the Union was not represented no objection was made to my receiving said hearsay testimony.

## Factual Issue No. (4)

The remaining issue stated by the Court with respect to which Respondent introduced evidence is "whether the Union electioneered at or near the polls during the election."

The testimony with respect to this issue is that of Baker, Mathovich, and employee Thurman James.

Baker testified that during the election he was seated at a table checking the people that came in to vote; that he saw a union representative (identified in the Regional Director's Report as Manning) about 25 feet away from him but did not know how long he had been there; that he did not see him speaking to any employee; and that at the time he saw Manning the voting "had finished, but the polls wasn't closed."<sup>10</sup>

Mathovich testified that after he voted he saw Manning and another union representative (identified as Peterson). His testimony continues as follows:

After I voted I went out to the parking lot area and they drove up in their car, got out of their car, they came into the shop and were talking around Bob Pitt's desk there, and Peterson went to the back door, it is a hallway that goes into the office there, and knocked on the door and Don answered the door and let Peterson in and Mannie [Manning] stayed out in the shop and he still stayed at Bob's desk and he was talking to some employees and then that group moved from there kind of catty-cornered across to a cavity mill and stood there talking to some other employees.

Q. How far from the voting booth was this?

A. Less than 100 feet. I'd say, a 100 feet.

Q. Do you recall whether any employees were standing in line to vote during this period?

A. At that period, no.

JUDGE: Had voting finished?

THE WITNESS: No. The voting booth had not closed yet. The time of the election had not expired yet.

However, he indicated that he was unable to testify that he saw anyone voting after he saw "Mannie" (Manning) and Peterson in the shop.

James testified, in effect, that, while the voting was still going on and he was waiting at the polls to vote, he saw Manning talking to a group of employees approximately 100 feet from the voting booth and that he saw one man from the group which had been talking to Manning later vote.

It appears that a resolution of the issue depends upon whether the *Milchem* rule<sup>11</sup> is applicable to the facts in the instant case. It is noted that the Board added, after setting forth the rule, that it will restrict its application, stating, "We will be guided by the maxim 'the law does not concern itself with trifles.'" In applying its stated rule in the *Michem (Milchem)* case the Board relied upon the affidavits to the effect that for about 5 minutes Union Secretary-

Treasurer Stevens stood within a few feet of about 15 men who were in line waiting to vote and "appeared" to be talking to them. The Board concluded: "On such a record, we believe that Stevens' conduct could not, in any view of the evidence, be dismissed as minimal."

There are two questions which arise in determining whether the *Milchem* rule should be applied to the instant case: (1) Was Manning in the "polling area"<sup>12</sup> at the time he talked to the group of men (at a distance of 100 feet away from the voting booth), and (2) was his conduct "minimal," in that apparently only one of the group of men with whom he was talking had not yet voted and his vote could not have affected the outcome of the election.

As to what distance from the voting booth constitutes the "polling area" under the *Milchem* rule, I am unable to find any guideline. In *Star Expansion Industries Corporation*, 170 NLRB 364, 365 (1968), the Board sustained an objection to electioneering activities "in close proximity to the polls" when the union representative engaged in such activities "notwithstanding the Board agent's instructions, on three separate occasions, that he leave the area and the admonition that he could not electioneer *within 50 feet of the polls.*" [Emphasis supplied.] In *Harold W. Moore & Son*, 173 NLRB 1258 (1968), the Board stated:

The Employer contended that conversations between three Petitioner representatives and several employees within 60 feet of the ballot box while the election was in progress constituted conduct which affected the results of the election under the rule established by the Board in *Milchem, Inc.*, 170 NLRB 362. It appears from the Employer's exceptions that the election was conducted in a warehouse building, the voting area being located about 30 feet from the entrance; that the conversations in question took place on a parking lot outside the warehouse, about 30 feet from that entrance; and that Petitioner's representatives conversed with a total of six or eight employees for varying lengths of time for 10 or 15 minutes after the polls were opened (the election was conducted from 4:30 p.m. to 6 p.m.).

The Acting Regional Director concluded that the rule of *Milchem* was inapplicable because the conversations amounted to "trifles." Although we agree with the Acting Regional Director's ultimate conclusion, we do so because the *Milchem* rule does not in any event apply to conversations with prospective voters unless the voters are, as was not true here, in the polling area or in line waiting to vote. Nor do we believe that the conversations, even if deemed to be electioneering, constituted objectionable conduct under our holding in *Star Expansion Industries Corporation*, 170 NLRB 364. The latter case involved substantial electioneering in close proximity to the polls, in disregard of the Board's Agent's instructions with respect to the no-electioneering area. The instant case, however, involves only the question of whether the alleged electioneering was so

conversations between a party and voters while the latter are in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks."

<sup>12</sup> There is nothing in the record to indicate whether the Board agent indicated what would constitute the polling area.

<sup>10</sup> Apparently the period within which the polls were to be open had not yet expired.

<sup>11</sup> The rule is apparently generally referred to as the *Milchem* rule, although in the report of the case the caption is "Michem." In *Michem, Inc.*, 170 NLRB 362 (1968), the Board stated at 363: "The rule contemplates that

near the polls as to be deemed objectionable. Under the circumstances present here, we find that it was not.

See also *Locust Industries Inc.*, 218 NLRB 717-718 (1975); and *Marvil International Security Service Inc.*, 173 NLRB 1260 (1968).

In the instant case the employees to whom Manning was talking were obviously not "in line to vote." James, who testified to observing Manning talking to them, was apparently, at the time, waiting to vote, and only one man voted before he did. The group to which Manning was talking was 100 feet from the booth. While the above-cited cases do not furnish a precise guideline as to how many feet from the voting booth the polling area extends, I am not convinced that in the circumstances of this case (viewed in light of the above-cited cases) it can be held that Manning's conversation with the group occurred in the polling area, as prescribed in the *Milchem* rule.

In any event, it appears from the *Milchem* case and others that the electioneering must be more than *de minimis* to apply the *Milchem* rule. *Glacier Packing Co., Inc.*, 210

<sup>13</sup> 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 recommendations herein may be adopted by the Board.

NLRB 571, 573 (fn. 5) (1974); *Modern Hard Chrome Service Co.*, 187 NLRB 82, 83 (1970). *Sonoco Products Company v. N.L.R.B.*, 443 F.2d 1334, 1337 (C.A. 9, 1971). The conduct of Manning in talking to a group of employees of which only one had not voted and whose vote could not have affected the outcome of the election would appear to be *de minimis*, as would his mere appearance some 25 feet from the voting booth after the voting had been completed (although the polls had not closed).

It is concluded that Respondent has failed to sustain the conclusionary facts set forth in factual issue numbered (4).

In view of the above findings of fact and conclusions, I make the following:

#### RECOMMENDATIONS<sup>13</sup>

It is recommended that the Board find that the objections to the election filed by Respondent have not been sustained, and that it affirm its Order in the instant proceeding (as reported in 211 NLRB 876, 878-879).