

Sil-Base Company and Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC, Petitioner. Case 6-RC-9899

September 21, 1988

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held September 14, 1987, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 13 for and 2 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

On September 28, 1987, the Employer filed timely objections and on October 9, 1987, the Acting Regional Director for Region 6 issued an order directing hearing on objections and notice of hearing. A hearing was held on October 28 and November 2, 1987. On December 11, 1987, the hearing officer filed his report recommending that the objections be overruled and that a certification of representative be issued. The Employer filed exceptions and a supporting brief and the Petitioner filed a brief in opposition to the Employer's exceptions.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings¹ and recommendations, as modified, and finds that a certification of representative should be issued.

In his report, the hearing officer erred by stating that DiPerna's union activity was limited to attending organizational meetings.² The testimony shows that DiPerna also made pronoun statements at the meetings.³ Even assuming that DiPerna is a supervisor, however, his pronoun conduct does not warrant setting aside the election.

There are three situations in which a supervisor's pronoun conduct may warrant setting aside an election. The first is when the employer takes no stand contrary to the supervisor's pronoun con-

duct, and employees may be led to believe the employer favors the union.⁴ The second involves the possibility that a supervisor's pronoun conduct could coerce employees into supporting the union out of fear of future retaliation by that supervisor.⁵ The third is similar to the second situation except that instead of coercion by fear of retaliation the employees could be coerced out of a hope of reward by the supervisor.⁶ In assessing whether a supervisor's conduct could reasonably tend to coerce employees in the exercise of their Section 7 rights the Board evaluates "the ability of a supervisor both to reward and retaliate against employees"⁷ and the extent of the supervisor's pronoun conduct.

The Employer claims that DiPerna's pronoun conduct, combined with his alleged ability to discipline employees and assign employees to the undesirable work of fibreglassing, coerced the employees into supporting the Union.⁸ We disagree.

The Employer's argument that DiPerna exercised authority over the entire unit by virtue of his ability to transfer employees into the departments⁹ he allegedly supervised¹⁰ is without foundation.¹¹

⁴ There is no such allegation in this case.

⁵ *Cal-Western Transport*, 283 NLRB 453 (1987).

⁶ *Ibid*.

⁷ *Ibid*.

⁸ The Employer also asserts that DiPerna had the authority to effectively recommend hiring. That is not proved. DiPerna denied he had this authority and stated that he merely showed applicants around the pattern department and, on instructions from owner Suey, had applicants cut a pattern to see how comfortable they were performing the cutting. DiPerna stated he gave his opinion as to which applicant was most comfortable cutting the pattern only on being asked by Suey. He also testified that he did not recommend the hiring of any particular employee. Given DiPerna's position as the only employee in the pattern shop and as the employee with the experience at pattern cutting, DiPerna's role in the hiring process, like his role in the shop generally, could just as well have derived from his experiences and skills as it could from any supervisory authority that might have been granted to him by the Employer. In short, a finding that he is a leadman is as tenable as one that he is a supervisor, based on the evidence here.

⁹ The Employer claims that DiPerna was a supervisor in both its pattern and quality control departments. DiPerna denied that he was a supervisor in either department. Again, it appears that any authority he may have exercised in the pattern department could have stemmed from his position as the longest serving employee in that department—which consisted of one or two permanently assigned employees (including DiPerna). See *infra*, fn 14. Even if we assume that DiPerna was the supervisor of the employees permanently assigned to both the pattern and quality control departments, however, DiPerna still would have had supervisory authority over, at most, two employees out of an approximately 16-employee unit. In this regard, we note that many of the Employer's examples of DiPerna's exercise of supervisory authority involve employees who, at the time DiPerna is alleged to have exercised his supervisory authority, were assigned permanently to the pattern department.

¹⁰ Shop Supervisor Holmes testified that approximately six or seven employees had helped DiPerna in the pattern department during the previous year.

¹¹ Although evidence that DiPerna could transfer employees into the departments he allegedly supervised would show a greater potential for coercion by him, it would not be determinative in this case, given DiPerna's limited pronoun conduct. See *infra*, 7-9.

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

² The testimony shows there were approximately six meetings and that DiPerna attended approximately four of the six.

³ Additionally, employee Wall stated DiPerna was one of the most active union supporters. He also stated, however, that DiPerna was not a leader of the union movement. DiPerna also admitted that he had offered employee VanNatta a ride to one of the union meetings.

It appears that on occasion employees are transferred into the department in which DiPerna worked to assist DiPerna. However, the testimony indicates that one of the other departmental supervisors—not DiPerna—selected the employee who would assist DiPerna.¹² Also, DiPerna credibly denied that he had veto power over the employees chosen to help him.¹³ Consequently, DiPerna's inability to select the employees he might want to reward or punish diminishes any coercive impact his alleged supervisory authority might otherwise have had.

Regarding the assignment of fibreglassing work, while DiPerna stated he had the authority to assign employees to fibreglassing or patternmaking,¹⁴ he also testified that he rarely was given help for anything other than fibreglassing. The record reveals that fibreglassing requires only 5 minutes of training, whereas patternmaking requires greater skill. Because DiPerna was given help only to speed up production, as a practical matter he had virtually no discretion to assign work in order to retaliate against or reward employees based on their union views.

Regarding discipline, the Employer does not claim that DiPerna can take disciplinary action himself but instead asserts that DiPerna can recommend discipline.¹⁵ In this regard the only example cited by the Employer is Holmes' testimony that DiPerna recommended that employee Flohr be fired. DiPerna denied having such authority and explained his purported recommendation to have Flohr fired as nothing more than a description of Flohr's work, from which he himself drew no conclusions concerning Flohr's retention.¹⁶ Moreover,

¹² DiPerna testified that if management pressed him to get a job done he would ask for help. Sometimes he got help, sometimes he did not. He also stated that even when he received help the other departmental supervisors could recall their employees from the pattern department even though the employees had not completed their work in that department.

¹³ DiPerna explained the one example of this alleged veto power cited by the Employer by noting that he merely had asked employee Beyers' supervisor, after Beyers had been selected to help DiPerna, to tell Beyers about the mistake he had made while fibreglassing during an earlier stint in the pattern department. Beyers subsequently has helped DiPerna in the pattern department.

¹⁴ DiPerna attributed this authority to his experience in the pattern department.

¹⁵ Plant Supervisor Holmes did state that DiPerna could take disciplinary action on his own "for something real serious." Holmes also testified, however, that no "real serious" incidents occurred in which DiPerna used this purported authority.

¹⁶ DiPerna specifically denied recommending that Flohr (who at the time was assigned permanently to the pattern department) be fired. DiPerna stated that Holmes asked him how Flohr was doing and that DiPerna told Holmes that Flohr did a pretty good job on some things and that he was lacking in others. DiPerna denied saying anything to Holmes about whether Flohr should continue to work in the department. Holmes' questioning of DiPerna about Flohr, again, can be attributed to DiPerna's experience in the pattern department and that he was the only other employee in the department. The hearing officer did not discuss this evidence. We note, however, that the hearing officer found DiPerna "to be a truthful and forthright witness."

Supervisor Holmes stated that he would review any disciplinary recommendation made by DiPerna "to make sure everything was fair." Consequently, even examining the evidence in the light most favorable to the Employer, we find that the limited number of employees DiPerna controlled because of his inability to select employees for transfer, his lack of real choice in assigning work, and his lack of independent authority to punish employees diminish the coercive impact of whatever supervisory authority DiPerna held.

Nor does it appear that DiPerna had any significant authority to reward employees, which in turn might coerce them into voting for the Union to seek favor with DiPerna. Thus, the employees' wage rates were set by Owner Suey and remained the same when employees transferred among departments.¹⁷ Further, the one example the Employer cited of DiPerna's authority to send employees home early was denied by DiPerna.¹⁸ Moreover, Plant Supervisor Holmes stated that supervisors usually cleared an "early out" with him before letting an employee go home. The Employer also stated that although DiPerna could not grant overtime he could effectively recommend it. Again, DiPerna denies this; in any event, Holmes stated that the recommendation had to be cleared through Suey. Thus, it appears that to the extent DiPerna had authority to reward employees, that authority could be exercised only in circumstances that would effectively minimize any hope on the part of an employee of unmerited reward.

Even if it is true that DiPerna had the supervisory authority ascribed to him by the Employer, in order for that authority to reasonably create fear of retaliation or hope of reward, the employees would have to be aware that DiPerna had that authority. As the hearing officer found, however, there is no indication that the employees had been advised of such authority.¹⁹

Further, even if we assume that DiPerna had supervisory authority and that the employees were aware of his authority, DiPerna's pronoun actions have not been "so marked or inordinate as to lead

¹⁷ In this regard, Plant Supervisor Holmes stated that DiPerna could recommend pay raises. He also stated that DiPerna had evaluated Flohr—citing the same incident he used to demonstrate DiPerna's alleged authority to recommend discipline of employees (see fn 16 above). Holmes further stated, however, that he was not sure if DiPerna had ever been told he was supposed to evaluate employees.

¹⁸ Holmes stated that DiPerna had requested that employee Vitale (who at the time was assigned permanently to the pattern department) be allowed to leave work early because his father was dying. According to DiPerna's version, however, DiPerna merely informed Holmes that Vitale was leaving because of his father's health status. DiPerna denied ever telling Vitale that he could go home early.

¹⁹ Employee Wall testified that DiPerna's job was to build patterns and that he was unaware of DiPerna ever disciplining or hiring employees.

the employees to fear possible retribution at [DiPerna's] hands in the event that they reject the Union"²⁰ The testimony shows that DiPerna's statements²¹ made at union meetings were in response to employee questions asking what DiPerna thought of the organizing effort DiPerna stated that the employees were interested in his opinion on this matter because he had worked for the Employer longer than any other employee In these circumstances, the pronoun statements are nothing more than personal opinions that were expressed without any hint of retaliation or reward²² Nor

does the assessment of employee Wall, given in response to a leading question, that DiPerna was one of the most active employees supporting the Union require us to set aside the election Despite that assessment, Wall's testimony indicates only that DiPerna attended union meetings and made the statements described at length in footnote 21, supra Finally, DiPerna's offer to give a fellow employee a ride to one of the union meetings is not the type of activity that requires invalidating the election

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit

All full-time and regular part-time production and maintenance employees employed by Sil-Base Company at its Juniper Street, McKeesport, Pennsylvania facility, who were employed during the payroll period ending August 14, 1987, excluding all office clerical employees, salespersons and guards, professional employees and supervisors as defined in the Act

NLRB 831, 832 (1979) ("Speculation is not to be substituted for evidence of coercion or fear in finding an improper effect on an election"), enfd 649 F 2d 50 (1st Cir 1981) Compare *Sheraton Motor Inn*, 194 NLRB 733 (1971) (Board set aside election where supervisor, inter alia, was union's "contact man" during the organizational campaign and told employees that management intended to cut wages if employees did not vote for the union), *Delchamps, Inc*, 210 NLRB 179 (1974) (Board vacated election when supervisors, inter alia, solicited employees under their control to join the union, sat on the petitioner's organizing committee, and urged employees to attend union meetings and vote for the petitioner)

²⁰ *Stevenson Equipment Co*, 174 NLRB 865, 866 (1969)

²¹ DiPerna's testimony regarding the statements he made is as follows

Q Did you make statements in favor of the union to people who worked at Sil-Base?

A Yes

Q Okay What did you tell them

A I just told them, I says, hey, you know, they were—see, they asked me because I had the most time in, they just says, you know, what do you think I says, hey, just, you know, look how long I've been here and we don't have much to go on I mean, we should be making more than what we are as far as wages and, you know Everybody feels the same way, you know, that's all there is to it

Q Well, did you tell them anything else?

A No That's, you know, basically

Q Did you give them any other reasons why they should join the union?

A No

Q You just left it with

A The only thing—I just said, hey, if, you know,—they came to me and said they were starting, okay, and I just—I says find, I'll show up at meeting And I went and then, like I said, they were asking me and I just says I've been there a long time and it's just what I saw And they all felt that—the way they feel about their wage and everything, that's their own opinion, I

Q I am asking you what you said?

A I just told them the only thing is make sure, if you want this, that everybody sticks together

Q Did you tell them why not—why they had to stick together?

A No I just says because if you don't stuck together then it's not going to go through If you start it and don't finish it, then nothing's ever going to get accomplished

Q Okay, Now, did you do anything else in support of the union?

A No

²² See *NLRB v Hawaiian Flour Mill*, 792 F 2d 1459, 1464 (9th Cir 1986), enfg 274 NLRB 1108 (1985) See also *Fall River Savings Bank*, 246