

**B. J. Titan Service Company and International Union of Operating Engineers, Local 12, AFL-CIO, Petitioner. Case 28-RC-4651**

September 19, 1989

**DECISION AND CERTIFICATION OF REPRESENTATIVE**

**BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND HIGGINS**

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 27, 1989, 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 16 for and 2 against the Petitioner. There were no challenged ballots.

The Board has reviewed the record in light of the exceptions<sup>1</sup> and briefs, has adopted the hearing officer's findings<sup>2</sup> and recommendations, and finds

<sup>1</sup> In the absence of exceptions, we adopt, pro forma, the hearing officer's findings and conclusions on Objection 2.

<sup>2</sup> In adopting the hearing officer's finding that comments by Supervisor Kenny did not coerce unit employees, we rely solely on his conclusion that the employees were not led to believe that the Employer favored the Union or to fear retaliation from a union-oriented supervisor. We further find it unnecessary to rely on his citation of *Century City Hospital*, 281 NLRB 35 (1986).

We agree with the Employer that the hearing officer's report does not discuss the Employer's separate argument that Kenny's comments—insofar as he reported alleged plans for antiunion retaliation by James DuPont, the Employer's district manager—coerced employees into voting for the Union in order to secure protection from antiunion retaliation, but we find no merit to this argument. Threats concerning possible antiunion retaliation by management are generally held to have a reasonable tendency to coerce employees into *declining* to support a union, even

that a certification of representative should be issued.

**CERTIFICATION OF REPRESENTATIVE**

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union of Operating Engineers, Local 12, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees including operators, mechanics, and drivers employed by the Employer at its Nevada Test Site; excluding all other employees, service supervisors, service engineer trainees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

when such threats are conveyed to employees by a friendly supervisor. See, e.g., *Central Broadcast Co.*, 280 NLRB 501, 501 fn 5, 531-532 (1986) (statements by Supervisor MacKinnon). It would be anomalous to rely on a supervisor's communication of such threats to set aside an election won by the union, notwithstanding that the supervisor had suggested to employees that the union might be able to protect them from the discriminatory actions allegedly planned by the employer. Under the Employer's theory, whenever an employer threatened employees with retaliation and a union promised to seek to protect them against such retaliation, an election victory by the union would have to be found tainted by the combination of employer threats and union promises. Such a proposition is contrary to the well-established principles that "a party to an election is ordinarily estopped from profiting from its own misconduct," *Republic Electronics*, 266 NLRB 852, 853 (1983), and that statements that stress the benefits of union representation in terms of job security constitute "permissible partisan appeal[s] for union support." *NLRB v Superior Coatings*, 839 F.2d 1178, 1181 (6th Cir. 1988), see *Smith Co.*, 192 NLRB 1098, 1101 (1971).

We note that in *Dreyers Grand Ice Cream*, 279 NLRB 817 (1986), a case not cited by the Employer, a divided board panel set aside an election on the basis of a supervisor's statements similar to those in issue here. As *Dreyers* is inconsistent with our decision today, it is overruled.