

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CEMEX CONSTRUCTION MATERIALS  
FLORIDA, INC.

Employer,

and

Case 12-RC-257813

INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, LOCAL 79

Petitioner.

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**PETITIONER'S MEMORANDUM IN OPPOSITION TO  
EMPLOYER'S REQUEST FOR REVIEW**

Petitioner INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 79 submits this memorandum in opposition to the Employer CEMEX CONSTRUCTION MATERIALS FLORIDA, INC.'s Request for Review of the Acting Regional Director's Decision and Certification of Representative. The Request for Review raises no genuine issues which warrant review, and it should accordingly be denied. The Acting Regional Director's detailed, well-reasoned and well-supported Decision, which adopts the Hearing Officer's equally detailed, well-reasoned, and well-supported Report on Objection and overrules the Employer's Exceptions to the Report, is correct in all respects. In addition to the well-founded findings, reasoning, authorities and conclusions expressed in the Decision, Local 79 offers the following.

**A. The Reality: The Allegedly Objectionable Conduct Could Not Have Affected the Result of the Election.**

The mail ballot election was conducted for employees at three locations. Cemex's single Objection is to alleged conduct by a single employee (Peregrin), toward two co-employees (Kates and Dick) at a single location (Wiggins Pass Road East) where only 10 of the 32 eligible employees

worked, on a single occasion (May 6, 2020), nine days before the mail ballots were sent to the employees by the Region. There was no evidence that Peregrin's alleged requests that Kates and Dick photograph their as-yet-unreceived ballots and send the photos to him were repeated or communicated to any other employee at *any* of the three locations. The Union won the election by 7 votes. Assuming the 4 challenged ballots were "no" votes, the Union still won by three. Hence, any allegedly objectionable conduct toward two employees was insufficient to affect the result.

In addition, Kates and Dick both testified that Peregrin made no threats and that they did not feel threatened, and that Peregrin did *not* say that the photographs would be sent to the Union; Kates and Dick did *not* take photographs yet they were *not* subjected to any reprisal; and Kates and Dick both testified that Peregrin's alleged requests did not change their vote.<sup>1</sup> As the Acting Regional Director found, and Cemex does not dispute, Kates openly withdrew his previous vocal support for the union *before* Peregrin allegedly made the request, via letter to the Union; hence, he was an open "no" vote which means the result was not affected by Peregrin's alleged requests to him. Therefore, even assuming the challenged ballots were "no" votes, in reality the Union won by *four*; and Dick's sole remaining vote could not have affected the result. That undeniable fact, while inconvenient to Cemex, should be determinative of the Request for Review.

Statements limited to a small number of employees who cannot affect the result are "isolated incidents" which are insufficient to set the election aside, because it is "virtually impossible" for them to affect the result of the election. Sea Breeze Health Center, 331 NLRB 1131, 1145 (2000); Recycle America, 310 NLRB 629, 629 (1993); Coca-Cola Bottling Co., 232 NLRB 717, 718 (1977). For that reason alone, the Request for Review should be denied.

**B. The Legal Distinction: Peregrin's Requests Were Not "Inherently Coercive", and Were Timely and Effectively Disavowed by the Union.**

The Objection alleged that Peregrin allegedly made the requests of Kates and Dick on or about May 6, 2020, 9 days before the mail ballots were sent out by the Region. The Union's Business Agent in charge of the campaign, John Sholtes, instructed employees at a meeting held the day before the mail ballots were issued that photographing ballots was prohibited, thereby disavowing and negating Peregrine's alleged requests. Sholtes' admonition was effective: there was no evidence (1) that any further requests were made prior to the election; or (2) that any employee actually photographed his/her ballot and/or sent a photograph to any other person, or to the union, after the ballots were issued. Moreover, the subsequent statement allegedly made by Peregrin to Dick after Dick had mailed in his ballot (approximately three or four weeks later) was not within the scope of the Objection, which was limited to May 6; and in any event it could not have affected the result because Dick had already returned his ballot, as the Acting Regional Director properly concluded.

Cemex attempts to analogize Peregrin's verbal requests to cases which involve photographing employees engaged in Section 7 activities; but the attempt fails because the Board has held that actually photographing employees – as opposed to merely *verbally soliciting willingness to take photographs* – is “inherently coercive” even when, as in this case, no threats are made. Randell Warehouse of Arizona, Inc., 347 NLRB 591 (2006)(“Randell II”). There is no case of which Local 79 is aware (and none is cited by Cemex) in which the “inherently coercive” standard has been extended to situations which do not involve actually photographing employees and thereby creating a record of their activities for later use. For that reason, Cemex's reliance on “photograph” cases is completely misplaced.

Conversely, the *only* decision involving requests that employees photograph their completed mail ballots was decided on the basis of the widespread threats of discharge made by the employer's

supervisor if the requests were refused. The threats were widely disseminated among the employees, including beyond the supervisor's work location, and thereby created an atmosphere of fear and coercion. Atlas Roll-Off Corp., 2014 NLRB Reg. Dir. Dec. LEXIS 37 (2014). The decision did *not* conclude that requests to photograph ballots, *if unaccompanied by threats of reprisal*, were "inherently coercive"; and, significantly, no merit was found to the union's claim that "election secrecy" was violated (as Cemex argues in this case) because there was no evidence that photographs were actually taken or sent to the supervisor. Accordingly, Cemex's attempted analogy of this case to Atlas Roll-Off is a comparison of apples to oranges. Moreover, the decision in Atlas Roll-Off found that the employer's CEO's subsequent disavowal of the supervisor's threats was too little and too late to be effective, and that the supervisor subsequently told employees to tell him how they voted, thereby reaffirming his threats. In contrast, Sholtes' admonition *not* to photograph ballots was made before the ballots were issued, and his admonition was effective: no other allegedly coercive conduct occurred after the ballots were issued but before employees had voted.

For these additional reasons, the Acting Regional Director properly analyzed Peregrin's alleged conduct under the appropriate objective standard, and reached a conclusion which is fully consistent with Board precedent.

**C. There is No Basis for Disturbing the Acting Regional Director's Adoption of the Hearing Officer's Credibility Resolutions.**

Cemex's assertion that Peregrin could not be credited in the respects set forth in the Hearing Officer's Report as adopted by the Acting Regional Director's Decision boils down to nothing more than a long-rejected argument that because Peregrin was not/should not be credited in part he cannot not be credited at all and, conversely, because Kates and/or Dick were/should have been credited in part they must be credited in full. That is utter nonsense, because the Board does not require that

testimony be credited on an “all or nothing” basis. Instead, “nothing is more common in all kinds of judicial decisions than to believe some and not all of a witness’ testimony”. Daikichi Sushi, 335 NLRB 622, 622 (2001)(citations omitted).

**D. The Acting Regional Director Properly Analyzed Peregrin’s Alleged Conduct Under Third Party Standards.**

A pro-union bargaining unit employee is not a union “agent” merely because of his activism or enthusiasm. If it were otherwise, then virtually *every* enthusiastic employee who communicates with other employees about an ongoing organizing campaign would be a union “agent” if he committed allegedly objectionable conduct without the union’s authority, knowledge, or consent – which is absurd. Yet Peregrin’s admitted activism, without more, is in substance Cemex’s entire “agency” argument in this case. That argument conveniently overlooks the fact that the employees knew that an organizer, Carlos Silva, was the union’s representative and employee contact, and that Silva was the intermediary between the employees and Business Agent John Sholtes, who was in charge of the organizing effort. It also overlooks the fact that the Union’s designated election observer was another employee from another work location, not Peregrin. There is no evidence that either the Union or Peregrin ever told any employee that Peregrin had any union representative status or authority. Accordingly, Peregrin’s communication of information from Silva to other interested employees, alone, is insufficient to prove that he had either actual or apparent authority to give directions on behalf of the Union; and no reasonable employee could have believed otherwise, as the Acting Regional Director properly concluded.

The two primary cases relied on by Cemex for its argument that Peregrin was a union “agent”, contrary to the Acting Regional Director’s well-reasoned analysis and conclusion that he was not, are easily distinguishable. In Lamar Co., LLC v. NLRB, 127 Fed. Appx. 144, 148-149 (5<sup>th</sup>

Cir. 2005) the Fifth Circuit upheld the Board's determination that employees who threatened to "kick your ass" if the Union lost were *not* agents of the union based on virtually the same evidence Cemex relies on for its argument in this case, and distinguished that evidence from Local 3, IBEW (New York Cablevision), on which Cemex relies. The same distinction applies here, as the Acting Regional Director properly concluded. And in Bristol Textile Co. there was far more evidence of agency and the conduct was far more egregious, including (a) the offending employee was identified by the Union Vice President as "my contact"; (b) he made weekly progress reports to the Union; (c) he confirmed that other employees viewed him as "representing the union at the plant"; (d) his objectionable threat of tire slashing was disseminated to other employees; and (e) neither he nor the union disavowed his threat. No such indicators of agency are present in this case.

**E. The Employer's Request for Extraordinary Relief Should be Denied.**

As part of its Request for Extraordinary Relief Cemex requests that the Board "stay" the Certification, which is not provided by Section 102.67(j) of the Rules. The request should be denied simply because there is nothing to "stay". The Certification is final, there are no further proceedings to be held, and *revoking* the Certification pending a determination of the Request for Review (which is in reality what Cemex seeks) would unfairly prejudice bargaining unit employees by causing undue, indefinite, delay of their present right to collectively bargain. There is also no reason to expedite the review process: bargaining may and should commence and continue while the Board considers whether to deny or grant review in due course.

**E. Conclusion.**

The Employer's Request for Review should be summarily denied.

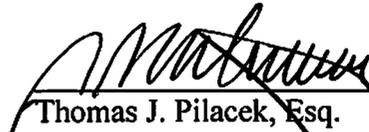
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of this Memorandum has been electronically filed with the

National Labor Relations Board on this 20<sup>th</sup> day of November, 2020 and has been served via email on the following parties: Amanda J. Fray, Esq. at amanda.fray@jacksonlewis.com and Jennifer A. Hadsall, National Labor Relations Board, at Jennifer.hadsall@nlrb.gov.

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