

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24**

<p>PRO CARIBE</p> <p style="text-align:center">Employer</p> <p style="text-align:center">and</p> <p>UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901, IBT, AFL-CIO</p> <p style="text-align:center">Petitioner</p>	<p>Case 24-RC-8380</p>
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SUPPLEMENTAL REPORT AND RECOMMENDATION ON OBJECTIONS

Pursuant to an Order Approving Stipulation to Set Aside Election and Notice of Second of Election issued by the Acting Regional Director on July 6, 2004¹, on July 23, 2004, a rerun election was conducted under my direction and supervision.

The tally of ballots of the rerun election, made available to the parties, revealed the following:

Approximate number of eligible voters	17
Void Ballots	0
Votes cast for Petitioner	8
Votes cast against Petitioner	3
Valid votes counted	11
Challenged ballots	4
Valid votes counted plus challenged ballots	15

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus the challenged ballots has been cast for the Petitioner.

¹The original election was held on May 27, 2004. On June 2, 2004, the Employer filed timely objections to the election and on June 18, 2004, the undersigned issued her Report and Recommendation on Objections and Notice of Hearing. Subsequently, the parties agreed that the original election be set aside and that a rerun election be held.

On July 29, 2004, the Employer filed timely objections to the election and to conduct affecting the results of the election. Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned Regional Director caused an investigation to be made of the objections to the election and to conduct affecting the results of the election and now sets forth her findings, conclusions and recommendations with respect thereto.²

The Employer's objections³ consist of nine paragraphs.

OBJECTIONS - NUMBERS 1 and 2

Because these objections solely recite the operative facts relating to the rerun election, I recommend that these be overruled.

OBJECTIONS – NUMBERS 3, 4, 5, 6, and 7

As these objections relate to the same conduct, they are consolidated for discussion purposes. Essentially, the Employer contends that sometime between July 12 and July 29, 2004, some unidentified person(s) and/or individual(s) “sabotaged” the Employer’s power supply. Although the Employer does not allege that the Petitioner or any agent of the Petitioner was responsible, it nevertheless asserts that because no such occurrences had ever happened in the past and because it was so proximate to the July 23 election, that the damage was caused by “insiders.” The Employer also asserts that the Petitioner had an affirmative duty to disavow the alleged misconduct. Finally, it argues, that this event frightened and coerced the employees who “understood that it was carried out by persons related to the election process...”

²By letter dated July 30, 2004, the Regional Director notified the parties that the Employer had filed the aforementioned objections and requested any relevant documents and supporting evidence. The Regional Director also advised that such evidence was to be received at the Regional Office no later than August 6, 2004. The Employer was specifically reminded that the moving party had an obligation to furnish evidence sufficient to prove a prima facie case; to include in its submission signed and notarized affidavits from any witnesses that could give relevant testimony concerning the objections; and to submit in writing the names, addresses and telephone numbers of all relevant witnesses together with a concise written summary of their testimony. Finally, the Employer was further cautioned that no extension of time for the submission of evidence and/or legal memoranda would be granted absent a showing of good cause.

³The objections are attached to this report as “Exhibit A.”

The Employer's evidence in support of its objection is limited to a letter dated July 19, 2004, from Miguel S. Descartes, an engineer, who discusses his findings concerning the alleged sabotage. According to Mr. Descartes, on July 12 and 13 the Employer discovered that a 38,000-watt power line that serviced the Employer's terminal opened the "Oil Circuit Breaker" in the switchyard of an unrelated company and had caused certain abnormalities purportedly having no technical or logical explanation. Mr. Descartes adds that this occurrence not only produced a power outage at the Employer's facility but also had the potential of causing even more serious consequences to adjacent neighbors due to the production of some odorless and colorless gas. He recommended that because of the potentially disastrous consequences of these incidents, that the Employer notify the appropriate City, State, and Federal authorities. The Employer also offered the testimony of Engineer Roberto Aponte Malavé; however, it did not disclose the substance of Mr. Aponte-Malavé's anticipated testimony.

It is well settled that where non-agents commit the challenged conduct, it is evaluated under a third party standard. *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *U. S. Electrical Motors*, 261 NLRB 1343 (1982). Under this standard, the objecting party must establish that the third party conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. *Westwood Horizons Hotel, supra*; *Cal-West Periodicals*, 330 NLRB 599 (2000).

In the instant case, there is no claim that the Petitioner or any specific person affiliated with the Petitioner was responsible for the alleged sabotage of the Employer's operations. Other than an unsupported general claim that the unit employees became aware of the power outage at the Employer's facility, there is no evidence that the unit employees had any reason to suspect that the event at issue was in anyway connected to the July 23 election. Further, there is no evidence that the Petitioner made or adopted any employee or agent statement or comment about the alleged sabotage. In fact, the Employer submitted no evidence to show that the Petitioner even knew or had reason to know that the Employer's business was somehow

interrupted by a power outage. Thus, the Petitioner can hardly be expected to disavow conduct that there is no basis to show they even knew about. Under these circumstances, I find that the Employer failed to establish any linkage between the alleged “sabotage” and the election in this case and that even assuming the event occurred, that it was so aggravated an occurrence that it created a general atmosphere of fear and reprisal upon employees rendering a fair election impossible. *Westwood Horizons Hotel, supra; Diamond State Poultry Co., supra*, I therefore, recommend that the Employer’s Objections Number 3, 4, 5, 6 and 7 be overruled.

OBJECTIONS – NUMBERS 8 AND 9

Objection Number 8 essentially alleges that the Petitioner distributed leaflets “with an appeal against imperialism and capitalism” which the Employer contends is akin to inciting “racial prejudice, overstressing and exacerbating social, racial and political feelings by irrelevant and inflammatory appeals”. The Employer cited no legal authority for its proposition. Objection Number 9 merely recites that by these and other acts the Petitioner has interfered with and restrained employees in the exercise of their Section 7 rights.

In support of this objection, the Employer submitted two leaflets containing general campaign rhetoric extorting employees to vote for the Petitioner and expressing its opinion about large multi-national corporations. There is no basis to determine that the leaflets circulated by the Petitioner during the campaign period were of an inflammatory nature or that the leaflets’ contents promoted social or racial prejudice.

In the case of Midland National Insurance Co. 263 NLRB 127, 130 (1982), the Board stated that it would no longer probe into the truth or falsity of pre-election campaign propaganda and would not set aside elections on the basis of misleading campaign statements. The Board has stated that it will only intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it purports to be. I find that the leaflets appended to the Employer’s objections do not contain any statements that appeal to racial prejudice or are inflammatory in nature which would warrant setting aside the election.

Rather, the leaflets contain lawful election campaign propaganda that is easily ascertainable as such by the unit employees. Accordingly, I recommend that the Employer's Objections number 8 and 9 be overruled.

RECOMMENDATIONS

For the reasons stated above, the undersigned recommends that the Employer's Objections be overruled in their entirety. It is further recommended that a Certificate of Representative be issued to Union de Tronquistas de Puerto Rico, Local 901, IBT, AFL-CIO.⁴

Dated at San Juan, Puerto Rico this 18th day of August 2004.



Marta M. Figueroa
Regional Director
Region 24
National Labor Relations Board

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⁴Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by September 1, 2004. Under the provisions of Section 102.69(g) of the Board's rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.