

Cranbar Corporation and Penso Corporation and Siu de Puerto Rico, afiliada a Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO Petitioner. Case 24-RC-3403

December 16, 1968

DECISION, ORDER, AND DIRECTION  
OF SECOND ELECTION

BY CHAIRMAN McCULLOCH AND MEMBERS  
FANNING AND BROWN

Pursuant to a Stipulation for Certification and Consent Election, an election by secret ballot was conducted in the above-entitled proceeding on March 8, 1968, under the direction and supervision of the Regional Director for Region 24 among the employees in the appropriate unit. At the conclusion of the balloting, the parties were furnished a tally of ballots, which showed that of approximately 728 eligible voters, 621 cast valid ballots, of which 342 were for, and 279 were against, the Petitioner, 49 ballots were challenged and 5 ballots were void. The challenged ballots were not sufficient in number to affect the results of the election. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and on August 5, 1968, issued and duly served upon the parties his Report and Recommendations on Objections, in which he recommended that the objections be overruled in their entirety and that the Union be certified as bargaining representative of the employees involved. Thereafter, the Employer filed timely exceptions to the Regional Director's Report 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 powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Employer at its two factories (Cranbar and Penso) at Ponce, P.R., including plant clerical employees and excluding all office clerical employees, executive and professional personnel, guards and supervisors as defined in the Act.

5. The Board has considered the Regional Director's Report, the Employer's exceptions and brief, and the entire record in this case, and hereby makes the following findings

There is no substantial dispute as to the facts set forth in the Regional Director's Report. According to the Report, on the afternoon of March 7, 1968, the day before the election, Justo Malave, the Employer's Industrial Relations Director, spoke to the employees over a local radio station stating, *inter alia*, that "The official position of management is that we don't want this Seafarers union—the SIU—or any other union here in Cranbar Corporation and Penso Corporation. That's why we'll object by any legal means to having a union in this plant . . ." He then explained the process of voting in the election and urged all the employees to vote against the Union.

Later that evening Jose Ramos, Director of Organizing for Petitioner, addressed the employees over a different local radio station. During this speech he referred to Malave's speech as follows.

. . . and following the advice which Mr Malave gave you, I tell you, brothers, that tomorrow is possibly the last chance you have to be members of a union. Yes—Mr. Malave also told you that tomorrow would possibly be your last chance to be members of a union. What he meant was to vote 'yes' and that is what Mr. Ramirez and we all have been telling the workers that the supervisors and other members of the management cannot say openly here that you should vote in favor of the union, but that you should notice that in their hearts in their feelings, they want you to belong to a union. It was for this that Mr. Malave told you 'remember friends, that tomorrow will be the last occasion that you have to belong to a union—and for you to vote for the one who gives you the more benefits.' Malave says this because he understands that when you receive a raise in salaries, he too will receive a raise in salary; when you receive more holidays with pay Mr. Malave will have more holidays to stay at home. When the Company gives you, as it is being given to the workers of Uniroyal, a Christmas bonus, Mr. Malave will also be given a Christmas bonus and it is for this that at the end of the program Mr. Malave told you and I again emphasize this, 'Remember that tomorrow will be the last day that you can belong to a union.'

. . . So that at the end of this campaign the management has told you, not directly, but indirectly, to vote yes, to organize yourselves, form your union, do what many workers of Puerto Rico have done

and are doing, organizing themselves as labor organizations.

He also spoke of the Banco Obrero de Puerto Rico (Worker's Bank) which was established by the Puerto Rican government for the benefit of the working class of Puerto Rico. Just prior to Ramos' speech, Angel Ramirez, organizer for the Petitioner, told of the Union's medical plan, stated that the Mayor of Penuelas (a small nearby town) was speaking in favor of the Union to the Employer's employees living in Penuelas.

The Employer's allegations in objections 6(a), 6(b), and 6(c), and 7 relate to Ramos' speech: objection 6(a) alleges that Ramos misrepresented the Union's health plan; objection 6(b) alleges that Ramos' claim that the Mayor of Penuelas spoke in favor of the Union was false; objection 6(c) alleges that Ramos misrepresented and deliberately misconstrued Malave's speech to the employees; and objection 7 alleges that Ramos misrepresented the facts and law concerning the Worker's Bank.<sup>1</sup>

The Regional Director recommended that all of the Employer's objections be overruled and that the Union be certified as bargaining agent of the Employer's employees in the unit found to be appropriate. We agree with and adopt the Regional Director's recommendations as to objections 6(a), 6(b), and 7 because in our opinion the Employer's exceptions raise no material or substantial issues of fact. However, we do not agree with the Regional Director's recommendation that objection 6(c) be overruled. On the contrary, we find merit in the Employer's exceptions thereto, that the Union materially misrepresented the Employer's position and that such misrepresentations were substantial and tended to influence the outcome of the election.

The Regional Director found that Ramos' speech was inaccurate, contained misstatements, and misrepresented the intent of Malave's speech but concluded, nonetheless, that Ramos' speech was mere campaign propaganda, and that the employees could easily recognize it as such, because Malave had so clearly and emphatically stated the Employer's opposition to unionization of its plant.

It is a matter of speculation, however, as to the number of employees who heard Malave's speech made earlier in the day, would remember sufficient of its details, and be in a position to recognize that Ramos was misquoting and misconstruing Malave's statements. Conceivably some, or many, employees may not have heard Malave's speech at all as it was broadcast on a Thursday afternoon at a time when most of the employees were likely to be at work, and

there is nothing in the record to show that the speech was heard in the plant; while Ramos' speech was broadcast over a different radio station at a time when the employees were off work and likely to be at home. But even if after a lengthy election campaign, employees generally become aware of the Employer's strong opposition to the Union, yet Ramos' speech lent itself to the belief that Malave had confided to Ramos what he could not express publicly, that is, that Malave and others among company management were in favor of the Union because they would ultimately benefit from the gains the Union would obtain for the employees. That implication in Ramos' speech was without foundation, but Ramos' speech had a sufficient ring of sincerity which could easily mislead employees into believing that his representations were truthful.

The Board has said <sup>2</sup>

As a general rule, absent coercion or fraud, the Board will not undertake to police or censor election propaganda. However, where a party deliberately makes material misrepresentations of fact in circumstances in which employees are unable to evaluate the assertions for truth or falsity, the Board has held that legitimate bounds of campaign propaganda have been exceeded and has set aside the election.

The Board has further stated <sup>3</sup>

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, may reasonably be expected to have a significant impact on the election.

But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it 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.

We believe that the Petitioner has exceeded the bounds of permissible propaganda in the present case.

<sup>1</sup> During the course of the investigation the Employer, with the Regional Director's approval, withdrew objections 1, 2, 3, 4, and 5, and that part of objection 8 which referred to these objections, but reserved the part of objection 8 which referred to objections 6(a), (b), (c), and 7.

<sup>2</sup> *Cleveland Trencher Co.*, 130 NLRB 600.

<sup>3</sup> *Hollywood Ceramics Co.*, 140 NLRB 221

Ramos' version of Malave's speech, which bore no resemblance to the speech as it was made by Malave, was for the purpose of influencing the employees to vote in favor of the Petitioner. This speech, misrepresenting, as it did, the attitudes of the Employer's management personnel toward unionization and implying that these personnel had publicly opposed the Union under pressure of the Employer, was substantial and of enough importance to affect materially the votes cast in the election. We are unwilling, on the record before us, to find that the employees were able to recognize the speech by Ramos as election propaganda. Furthermore, Ramos' speech, made on the eve of the election, did not permit enough time for the Employer to make an effective reply before the election.

Under all of the circumstances, we hereby sustain the Employer's objection 6(c). Accordingly, we shall

set aside the election and direct that a second election be held.

#### ORDER

It is hereby ordered that the election conducted herein on March 8, 1968, be, and it hereby is, set aside.

[Direction of Second Election<sup>4</sup> omitted from publication.]

MEMBER BROWN, dissenting:

Unlike my colleagues, I would adopt the Regional Director's recommendations essentially for the reasons given by him that all the objections be overruled and certify the Petitioner as the collective-bargaining agent of the Employer's employees in the unit found to be appropriate.

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<sup>4</sup> An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 24 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed *Excelsior Underwear Inc.*, 156 NLRB 1236. However, in *Wyman-Gordon v N L.R.B.*, 397 F.2d 394 (C.A. 1), the Court of Appeals for the First Circuit, while indicating approval of the substance of the Board's *Excelsior* decision, held that the requirement of the furnishing of an eligibility list is void because it was not adopted

in conformity with the provisions of section 4 of the Administrative Procedure Act (5 U.S.C. Sec. 553). While noting our disagreement with *Wyman-Gordon*, we shall in deference to the First Circuit modify our procedures in elections conducted within the territorial jurisdiction of that Circuit where an employer refuses to furnish the eligibility list. In such cases, until the propriety of the Board's procedure in adopting the *Excelsior* requirement has been finally determined, we shall not issue a subpoena for the production of the list, nor shall we seek Court enforcement of the requirement; and upon the filing of timely objections on the ground an election was conducted without the list, the objections will be held by the Regional Office until such time as the propriety of the Board's procedure in adopting the *Excelsior* rule has been finally resolved.