

Rebmar, Inc. and Congreso De Uniones Industriales
De Puerto Rico, Petitioner. Case 24-RC-3555

December 31, 1968

DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION

Pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted on February 9, 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 election, the parties were furnished with a tally of ballots which showed that, of approximately 400 eligible voters, 378 cast ballots, of which 191 were for, and 141 against the Petitioner, 44 were challenged, and 2 were void. The challenged ballots were insufficient in number to affect the results of the election. Thereafter, the Employer filed timely objections to the conduct of the election.

On July 1, 1968, the Employer submitted a request for approval of its withdrawal of objections Nos 2, 3, and 4. The request was granted and the withdrawal approved on July 8, 1968. In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and, on July 11, 1968, issued and duly served upon the parties his Report on Objection, in which he recommended that the sole remaining objection be overruled in its entirety and that the Petitioner be certified as the collective-bargaining representative of the employees in the appropriate unit. Thereafter, the Employer filed timely exceptions to the Regional Director's Report.

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

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act, as amended, 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 the 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 constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All of the Employer's production and maintenance employees including truckdrivers and their helpers at its factory located at Barrio Cibuco, Corozal, Puerto Rico, excluding guards, office clerical employees and supervisors as defined in the Act.

5. As noted above, the Regional Director found the Employer's objection to be without merit. We do not agree

The sole issue before the Board concerns the distribution during the election campaign by the Petitioner of a handbill which in part consisted of a portion of the Board's election notice. One side of the handbill was a reproduction of that portion of the election notice entitled "Rights of Employees" complete with the Board's seal and name. The only addition to this side of the handbill was a statement superimposed at the top to the effect that "The government protects your right to organize yourself in a union." The reverse side of the handbill contains an explanation, couched in broad generalized language, of what a union is, how a union functions, and what a collective-bargaining contract contains. Nowhere does the handbill refer to or mention the Petitioner by name.

We find merit in the Employer's objection and will set aside this election, and direct a new election. Our concern is not with the substance of the material added to the Board's official notice of election, but with the possible impact such a partisan message added to an official Board document, or copy thereof, might have on the freedom of choice of the voter. We are of the opinion that the Board has a responsibility to inform employees fully of their rights and privileges under the Act, and to conduct elections in an atmosphere conducive to a determination of the uninhibited preference of employees. To that end the Board's notice of election contains information the Board believes should be made available to employees to improve their capability of casting a vote that fully reflects this freedom of choice. To this end the Board also publishes a leaflet including the same type of information, and it is available to anyone who desires to use it. The Board also has a responsibility to protect its processes against abuse or undesirable use. To duplicate a part of the Board's official notice and then to add to it a personal partisan message that may be interpreted by the employee as an endorsement by the Board of one of the parties to the election, and thus have an impact on the employees' freedom of choice, is, we think, an undesirable use of Board documents designed for another purpose. That the Union's message in this case may be arguably innocuous and that there may have been at most a narrow or technical violation of the *Allied Electric Products*, 109 NLRB 1270, rule, is clearly irrelevant. Whether deliberate or unintentional, such action has a tendency to mislead, and we are of the opinion that the Board should guard against having its prestige put to such possible abuse.

Accordingly, as we have sustained objection 1, we shall set the election aside and direct a second election.

ORDER

It is hereby ordered that the election conducted

herein on February 9, 1968, be, and it hereby is, set aside

Direction of Second Election¹ omitted from publication

MEMBERS BROWN AND JENKINS, dissenting.

The *Allied Electric Products* rule, cited by the majority, prohibits reproduction of the Board's official ballot in altered fashion. The Board's stated rationale for the rule is to prevent any participant in a Board election from "suggest[ing] either directly or indirectly to the voters that this Government Agency endorses a particular choice" (109 NLRB at 1272).

Apart from the fact that the present case involves reproduction of an election notice, not an official ballot, we are unable to interpret the questioned handbill as conveying even the slightest suggestion that the Board was endorsing either a "yes" or "no" vote in the election. Petitioner merely published material from the Board's own election notice which the Board wishes disseminated, and it added non-proscribed, vague, low key, and innocuous propaganda.

We would affirm the Regional Director's recommendation, and certify the election results.

¹ 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 NLRB*, 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.