

Benavent & Fournier, Inc. and Congreso de Uniones Industriales de Puerto Rico, Petitioner. Case 24-RC-4945

January 23, 1974

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, KENNEDY, AND PENELLO

Pursuant to a Stipulation for Certification Upon Consent Election, a secret ballot election was conducted on March 2, 1973, under the direction and supervision of the Regional Director for Region 24 among the employees in the stipulated unit described below. At the conclusion of the election, the Regional Director served on the parties a tally of ballots which showed that of approximately 21 eligible voters, 23 cast ballots, of which 11 were for, and 8 against, the Petitioner, with 4 challenged ballots. The challenged ballots were sufficient in number to affect the results of the election. The Employer filed timely objections. Subsequently, the parties stipulated, with the Regional Director's approval, that three of the employees whose ballots were challenged are ineligible to vote and agree that the challenges to their ballots be sustained. The parties agree that the remaining challenged ballot is insufficient in number to affect the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Regional Director conducted an investigation and on May 31, 1973, the Regional Director issued and duly served on the parties his Report and Recommendation on Objections and Challenged Ballots, attached hereto as an Appendix, recommending that the objection¹ be overruled and that Petitioner be certified as the exclusive collective-bargaining representative in the stipulated unit. 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 authority in this proceeding to a three-member panel.

Upon the entire record in this case the Board finds:

¹ Prior to the issuance by the Regional Director the Employer withdrew all but one of its objections

² In our opinion, the exceptions raise no material and substantial issues of fact or law which would warrant reversal of the findings and recommendations of the Regional Director

In our opinion it is better procedure for the Board Agent to retain custody of the unmarked ballots at all times. However, here the evidence shows that the ballots were in the custody of the observers during the short

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 labor organization involved claims to represent certain employees of the Employer.

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

4. The parties stipulated and we find that the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Employer at its factory in Minillas Industrial Development Park, Bayamon, P.R., but excluding all office clerical employees, all sales personnel, guards and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report and the Employer's exceptions and brief and the entire record in this case and hereby adopts the Regional Director's findings, conclusions, and recommendations.²

As the Petitioner has received a majority of the valid ballots cast, we shall certify it as the exclusive bargaining representative of the employees in the unit found appropriate.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Congreso de Uniones Industriales de Puerto Rico, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

MEMBER KENNEDY, dissenting:

I would sustain the objection to the conduct of the election and direct a second election.

During the voting session, the Board agent left the voting area "for a period from two to five minutes." He left the ballots on a table and the ballot box unsealed. While the observer for the Petitioner signed the certificate of conduct certifying that the ballot box had been protected at all times, the Employer's observer refused to do so.

time required for the Board Agent to use the restroom facilities. No one touched the ballots during that period. Accordingly, there could not have been any effect on the election. *General Electric Company (Clock and Timer Department)*, 119 NLRB 944, *Anchor Coupling Co., Inc.*, 171 NLRB 1196, and *International Union of Electrical, Radio and Machine Workers [Athbro Precision Engineering Corp.] v NLRB*, 67 LRRM 2361, 57 LC § 12, 440 (DC DC., 1968)

A cardinal principle of the Agency is that "before, during, or after an election, no one should be permitted to handle any ballot except a Board agent and the individual who votes that ballot." See Section 11306 of the Board's Field Manual, published July 1, 1967.

There has been a serious irregularity in the conduct of the election herein, in my view. The Board Agent surrendered personal custody of the unused ballots at a time when access to the ballot box was possible. In *Athbro Precision Engineering Corp.*, 166 NLRB 966, we observed:

The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.

I do not regard the Board agent's abandonment of the ballots and ballot box to others as an acceptable standard in conducting elections.

APPENDIX

REPORT AND RECOMMENDATION ON
OBJECTIONS AND CHALLENGED BALLOTS

Pursuant to a Stipulation for Certification Upon Consent Election executed on February 5, 1973, an election by secret ballot was conducted under the direction of the Regional Director on March 2, 1973, among all production and maintenance employees employed by the Employer at its factory in Minillas Industrial Development Park, Bayamon, P.R., but excluding all office clerical employees, all sales personnel, guards and supervisors as defined in the Act, to determine whether or not said employees desired to be represented for the purpose of collective bargaining by Congreso de Uniones Industriales de Puerto Rico, hereinafter referred to as Petitioner.

The Tally of Ballots duly served upon the parties reveals:

Approximate number of eligible voters	21
Void ballots	0
Votes cast for Petitioner	11
Votes cast against participating labor organization	8
Valid votes counted	19
Challenged ballots	4
Valid votes counted plus challenged ballots	23

Challenges are sufficient to affect the results of the election.

On March 9, 1973 the Employer filed and served

timely objections to conduct affecting the results of election. The undersigned Regional Director, pursuant to the Stipulation for Certification Upon Consent Election and in conformity with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, caused an investigation to be made concerning the objections and the challenges, and hereby issues his findings and recommendations with respect thereto.

THE CHALLENGES

During the course of the election the Board agent challenged the ballots of *Fernando O'Neill*, *Rolando Rivera Rosa* and *Angel L. Rodriguez Rivera* because their names did not appear on the eligibility list and Petitioner challenged the ballot of *Jose Torres Olvino* because he is not an hourly paid employee.

On May 30, 1973, the parties executed a Stipulation on Challenges which I have approved, in which the parties for the reasons set forth therein agree that challengees Rivera, O'Neill and Rivera Rodriguez are ineligible to vote and agree that the challenge to their ballots be sustained. The parties further agree that the remaining challenged ballot does not affect the ultimate result of the election and therefore no ruling with respect thereto is required. The parties have waived their procedural rights.

In accordance with the approved Stipulation, I recommend that the Stipulation on Challenges be accepted.

As a result of the foregoing Stipulation on Challenges and my recommendation with respect thereto it now results that the majority of valid votes counted plus challenged ballots have been cast for Petitioner.

THE OBJECTIONS

The objections as filed consisted of six counts. On May 25, 1973 the Employer, with my approval, withdrew five of them leaving only one count to be considered as follows:

. . . at around 2:30 P.M., while the election was being conducted the Board Agent excused himself from the voting area prior to all ballots being deposited and returned around five (5) minutes later, after which three (3) additional ballots were cast.

The investigation reveals that during the final minutes when the polls were still open, the Board agent excused himself with the observers and was away from the voting area for a period of from two to five minutes. While the Board agent had absented

himself from the area to use the restroom facilities the Employer's and Petitioner's observers remained in the restricted voting area and pursuant to the Board agent's instructions they were jointly in custody of the ballot box and the other election material including the unused ballots with the injunction that such materials not be tampered with. There is no evidence that anyone except the Board agent handled or touched the blank ballots nor is there any evidence that anyone tampered with the ballot box while the Board agent was temporarily away. The observers in their statements confirm this. The observer for Petitioner signed the certificate of conduct certifying that the ballot box had been protected at all times. The Employer's observer did not sign the certificate upon instructions issued by

Employer's counsel prior to the beginning of the election.

Based on these facts and following Board precedent¹ I find this objection without merit and recommend that it be overruled.

RECOMMENDATION

Having found the Employer's objection without merit and having recommended that it be overruled and further having found and recommended that challenges Rolando Rivera, Fernando O'Neill and Angel L. Rivera Rodriguez are not eligible voters and the challenge to their ballots be sustained, and that the remaining challenged ballot does not affect the ultimate results of the election, it is recommended that appropriate Certification of Representative issue.²

¹ *General Electric Company (Clock & Timer Department)*, 119 NLRB 944, and *Anchor Coupling*, 171 NLRB 1196

² Under 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 June 11, 1973.