

ACE HOTEL NEW YORK

Employer

and

Case No. 02-RC-071384

NEW YORK HOTEL & MOTEL TRADES COUNCIL

Petitioner

and

CONSOLIDATED COMMERCIAL WORKERS OF AMERICA,  
LOCAL 528, AFFILIATED WITH NOITU-IUJAT,

Intervenor

PETITIONER'S REPLY BRIEF TO INTERVENOR'S EXCEPTIONS TO THE REGIONAL  
DIRECTOR'S AMENDED REPORT ON OBJECTIONS AND RECOMMENDATIONS

An Election in the above case was held on March 2, 2012. The tally of ballots reveals that 57 votes were cast for the Petitioner, 31 votes were cast for the incumbent Intervenor and one vote was cast for neither. Challenges were not sufficient to affect the results of the election. Intervenor filed Objections which were overruled by the Regional Director in her Amended Report on Objections and Recommendations and on May 31, 2012 Intervenor filed Exceptions to that Decision contending that the Regional Director's decision to overrule Intervenor's Objections 1, 3, 4 and 5 should be reversed. Petitioner contends that the Regional Director properly overruled the Objections and submits the following Brief in support of that contention.

Intervenor Objection 1 contends that there were threats made by third parties which made a fair election impossible. While Intervenor in its exceptions did not set forth the nature of the alleged threats, it attached several affidavits which purportedly contain the relevant evidence. Specifically, employee Kaydee Bonilla in her affidavit stated that in November 2011 employee Sangpo Tenzin, a supporter of the Petitioner, asked employee Liz (LNU but identified as "an Asian woman") why Liz should vote for the Petitioner. Liz, who is not identified as a supporter of the Petitioner allegedly said that she heard that if the employees did not vote for Petitioner, they would be replaced by a cleaning company.

In what appears to be a reiteration of the above, Bonilla stated that in or about the end of November 2011, employee Amanda Rodriguez told Bonilla that she heard from Liz that "Asians were talking that we would be replaced by a cleaning company."

Bonilla stated that she asked supervisor Cy Gomez about the rumor who assured Bonilla that she should not worry about it.

Bonilla also testified that employee Daniel LNU told Bonilla in mid February that she and those she associated with her would lose her jobs if the Petitioner won the election. Significantly, Bonilla stated that she took this as joke and did not tell anyone at that time about the conversation with Daniel.

The only other evidence regarding alleged threats was supplied by Vice President of Intervenor. He stated that employees told him that other employees told them that they did not attend Intervenor's meetings because they had been intimidated that they would lose their jobs if they attended the meetings and supported the Intervenor. He also testified that an employee whose name he did not know told him that she was threatened with losing her job by supporters of the Petitioner.

Intervenor cites several cases that stand for the well established proposition that threats by third parties can invalidate an election. Intervenor contends that the evidence set forth above rendered a free election impossible and cites PPG Industries, 350 NLRB 225 (2007) to support that allegation.

The Board in Westwood Horizons Hotel, 270 NLRB 802 (1984) set forth the test that it applies to determine if third-party threats rise to the level of objectionable conduct. The Board stated that it would set aside an election where the alleged threats are "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." In assessing the seriousness of such threats, the Board considers (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was "rejuvenated" at or near the time of the election.

The evidence of extreme and pervasive threats against employees who would not cross the picket line that was involved in PPG Industries, supra, is hardly the same as the isolated generalized statements offered by Intervenor in the instant case. Rather, the resolution of the instant case is controlled by Mastec Direct TV, 356 NLRB No. 110 (2011) curiously not cited by Intervenor, in which threats by third parties more extreme than involved in this case was held not be sufficient to overturn the results of the election. It is also significant that the Employer in this case reassured employees that there would be no retaliation if they supported the Intervenor and the affiant herself laughed off the alleged coercive comment. Moreover, much of evidence regarding alleged threats occurred months before the election.

For the foregoing reasons, Intervenor's exception to the overruling of its Objection 1 should be denied.

Intervenor's Objections 4 and 5 appear to be a reiteration of its Objection 1 except that Intervenor also seems to contend that it was improper for the Petitioner to visit employees at their family business. Why such campaigning should be held improper is not set forth by Intervenor nor does it cite any authority for this novel proposition. Exceptions to the overruling of Objection 4 and 5 should likewise be denied.

Intervenor excepts to the RD's decision to overrule Objection 3 which alleged the use of an employee's photograph is objectionable if the employee has not given consent to its usage. Intervenor does not assert that the Petitioner improperly took the photograph, only that it used a photograph that was generally available. The rule Intervenor asks the Board to adopt would make it virtually impossible for any party to use group photos and would greatly inhibit reasonable campaign activity. Intervenor cites no rationale for the adoption of this novel rule nor is there any case authority to support it.

Intervenor's Exception to the overruling of Objection 3 should be denied.

Finally, Petitioner wishes to call to the Board's attention the fact that the election was conducted over 3 months ago and that Intervenor has remained the incumbent during this period of time notwithstanding its minority support in the unit. Further delay could result in making it more difficult to for Petitioner to engaging in meaningful contract negotiations should the Petitioner be certified. Accordingly, it is respectfully requested that the Board expedite the handling of this matter.

Respectfully submitted,

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