

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

C.R. ENGLAND INC. Employer and TEAMSTERS, LOCAL 705 Petitioner	Case 13-RC-095967 Stipulated
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HEARING OFFICER'S REPORT ON OBJECTIONS¹

This report contains my findings and recommendations regarding the Employer's objections to conduct affecting the results² of the election³ conducted under the direction of the Regional Director for Region 13 of the National Labor Relations Board on February 19, 2013, among the Employees in the Stipulated Unit⁴. The Employer, on February 26, 2013, filed timely objections to conduct affecting the results of the Election, a copy of which was served on the Petitioner. Based upon my careful consideration of the entire record and all evidence presented therein, I recommend that the Employer's Objections be overruled and the Petitioner,

¹ This report makes findings with regard to Employer's objection number 2. The Employer's first objection challenged the Regional Director's authority to conduct and supervise a valid election pursuant to *New Process Steel*, 130 S. Ct. 2365 (2010) and *Noel Canning v. NLRB*, No. 12-1115 (D.C. Circuit January 25, 2013). For the reasons set forth in the Regional Director's Report on Objections and Notice of Hearing (Board Exhibit 1(a)), that objection was denied and therefore not addressed in this report.

² The tally of ballots shows that there were approximately sixty-nine eligible voters. Forty-three ballots were cast for the Petitioner and twenty-three ballots were cast against the participating labor organization, there were zero void ballots, and zero challenged ballots.

³ The election was conducted pursuant to a petition filed on January 8, 2013, and a Stipulated Election Agreement approved on January 17, 2013. The payroll eligibility date for the election was January 16, 2013.

⁴ All full-time and regular part-time intermodal drivers employed by the Employer at its facility currently located at 4750 S Central Ave, Chicago, Illinois; but excluding driver evaluators, owner operator drivers, broker drivers, independent contractors, managerial employees, confidential employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

International Brotherhood of Teamsters, Local 705, be certified as the employees' exclusive collective bargaining representative.

I. **Burden of Proof for Election Objections**

Representation elections are not lightly set aside. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000). As the party raising objections, the Employer here bears the burden of proving that objectionable conduct warrants setting aside the election. *NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961). In evaluating objectionable conduct in the context of elections, the Board uses two standards depending on whether the alleged objectionable conduct stems from a party to the election or a third party. In evaluating party conduct during the critical period, the Board applies an objective standard, under which conduct is found to be objectionable if it has the tendency to interfere with employees' freedom of choice. *Cambridge Tool and Mfg. Co.*, 316 NLRB 716, 716 (1995). The Board employs a higher standard in cases of alleged third party misconduct. The Board will not set aside an election based on third party conduct unless the objecting party proves that the conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

In the instant case, the Employer filed objections regarding four incidents allegedly affecting the results of the election. Three of the objections allege conduct by unknown third party actors. The Employer did not allege in its objections nor presented evidence that any of the alleged acts were committed by the Union or any agents thereof. Accordingly, Objections 2(a)-2(c) are properly analyzed under the third party conduct standard set forth in *Westwood Horizons*

*Hotel*⁵. Objection 2(d) alleges misconduct by agents of the Union and is properly analyzed under the party standard set forth in *Cambridge Tool and Mfg. See Supra*.

II. Objection 2(a)

Facts

Objection 2(a) alleges that an act of violence was committed against a known opponent of the Union during the critical period, causing a general atmosphere of fear during the time leading up to the election. The Employer alleges that an unknown individual threw a brick through the window of anti-union employee Deandre Pittard as he drove his truck. The incident occurred following a captive audience meeting in which employees viewed a film of an anti-union employee having a brick thrown through his vehicle window. Objection 2(a) further alleges that Pittard shared the incident with other employees prior to the election.

During the hearing, the Employer presented Pittard⁶ and Lead Driver Manager, Julian Trafford Goss for testimony. On cross examination, Pittard provided a detailed account of the incident. Pittard testified that as he was driving through a south Chicago neighborhood, a Dodge Charger narrowly passed his truck on a one lane street. After the Charger passed him, another Cadillac approached his truck from behind. There was no room for the Cadillac to pass Pittard's truck and the Cadillac flashed its lights. Pittard then found himself between the Charger and Cadillac. As Pittard approached a red light, the Charger continued through the light. As Pittard was stopped at the light, a passenger exited the Cadillac and the Cadillac's driver made a left turn

⁵ In its objections and post hearing brief, the Employer cites to *Cedars Sinai Hospital*, 342 NLRB 596 (2004). In that case, the administrative law judge used the party conduct standard because in her opinion, the evidence supported an inference that the anonymous acts could be reasonably attributed to the Petitioner. Neither party took exceptions to the application of the party conduct standard and therefore, the Board used the party conduct standard for its review. *Id.* This case is not persuasive in the analyzing Objections 2(a)-2(c) under the party conduct standard as the record does not support any connection between the alleged acts and the parties.

⁶ Pittard was called by the Employer however became an adverse witness to the Employer. He provided a more detailed account of his encounter when questioned by the Union's attorney.

at the light. The passenger threw a brick at Pittard's windshield. The passenger ran in the direction in which the Cadillac turned.

Pittard testified that he believed he was caught in the middle of an altercation between two cars. He stated he believes the Cadillac passenger threw the brick in retaliation for being in the middle of their chase. I do not credit Pittard's ultimate conclusion of the intent of the drivers as it amounts to mere speculation. I do however, credit his recollection of the facts.

Pittard provided testimony regarding his dissemination of the incident to other employees. Pittard stated that his truck sat in the yard for a few days after the incident and the damage to his windshield was visible to the employees. Pittard testified that he told two employees about the encounter prior to the election. In addition, Pittard testified that roughly two employees asked him about the incident. Pittard states he generally told them a brick was thrown at his window and did not provide many additional details. Contrary to the Employer's objections, Pittard added that he was not present for the captive audience speech in which the Employer showed the video of a brick being thrown through the window of an anti-union employee.

Pittard also testified regarding his position on the Union. Pittard testified that the prospect of the Union was a "50-50 proposition" to him. He added that he never told employees he was against the Union⁷.

The Employer also provided testimony from its Driver Manager, Julian Trafford Goss. Goss testified that Pittard submitted a letter to him describing the encounter the night it took place. Goss also admitted that Pittard was not present at the captive audience meeting in which

⁷ The Employer did not provide any witnesses to testify regarding this fact alleged in the objection. Therefore, I credit Pittard's un rebutted testimony that he did not inform employees that he was anti-union.

the Employer showed a video of a brick being thrown through the windshield of an anti-union employee.

The Union provided two witnesses who testified regarding Pittard's incident. Both witnesses were aware that a brick had been thrown through Pittard's window. One employee learned of the incident because he was in the office when the incident was reported. The other employee learned of the incident from the employee that was in the office when it was reported. Neither employee testified to knowing whether Pittard supported the Union or not.

Analysis

Because the objection alleges conduct from an unknown source, the objection is properly analyzed under the *Westwood* factors. Accordingly, the election will not be aside unless the Employer provides evidence that the conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In assessing the seriousness of an alleged threat, the Board considers the following factors: (1) the nature of the threat itself; (2) whether it encompassed the entire unit; (3) the extent of dissemination; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or received at or near the time of the election. *Id.* at 803.

The Employer failed to meet its burden under *Westwood*. Most notably, the Employer provided little evidence of dissemination to other employees. The Employer rests solely on Pittard's testimony that he told a few employees about what happened to him. The Employer provided no corroboration from any employees who were aware of what happened to Pittard and could provide support to the contention that there was a general atmosphere of fear preceding the election. The Employer also suggests that employees were aware of the incident because

Pittard's window shattered truck sat in the company yard. Once again the Employer failed to provide any support for this assertion. The Employer did not provide testimony indicating employees saw the damaged truck and associated it with the election. The Employer failed to provide evidence that the incident was known by employees and resulted in a general atmosphere of fear.

The nature of the threat also weighs against finding the incident created a general atmosphere of fear among employees. While throwing a brick through a vehicle window is a serious and violent act, the incident involved one employee, whose sentiments toward the Union was not widely known. The encounter occurred away from the Employer's facility and there is no evidence that would separate the incident from being an isolated event unrelated to the union election. Accordingly, the Employer failed in its burden to prove that a general atmosphere of fear and reprisal was created so as to render a free election impossible. There is no basis for setting aside the election on this objection.

III. **Objection 2(b)**

Facts

Objection 2(b) alleges that on February 3, 2013, Cornelius Yarbough, a known opponent of the Union, came to work to find the radiator cap on his truck missing, the fluid in the radiator low and the tire pressure let out of his tires. In addition, it is alleged that Yarbough told other employees what happened to his truck.

The Employer provided testimony from Yarbough and Goss regarding objection 2(b). Yarbough testified that when he arrived to work on February 3, he performed his routine pre-trip inspection of his truck. During his inspection he noticed the radiator cap on his truck was missing, the fluid in the radiator was low and the tire pressure was let out of his tires. Yarbough

stated that the coolant level was so low that it triggered the safety mechanism, which cut the engine off. Yarbough testified that he called the weekend manager and took pictures to document the issues with his truck. Yarbough testified that he told a handful of drivers on three separate occasions about what happened to his truck. Yarbough also testified that he generally stated his position against the Union to drivers at the conclusion of the captive audience meetings.

Goss testified that Yarbough reported the incident to him and on several occasions told him that he was opposed to the Union. At the hearing Goss initially testified that he did not hear Yarbough tell other drivers that he opposed the Union however, after stating he was unsure, Goss contradicted his earlier testimony stating that he did hear Yarbough tell other drivers that he opposed the Union. Because of this contradictory testimony, I do not credit his contention that he heard Yarbough tell drivers he was opposed to the Union. The Employer did not present employee testimony to corroborate Yarbough's alleged dissemination of the tampering to his truck nor his voiced union opposition.

The Union presented four witnesses who testified to knowing Yarbough. These witnesses testified that they interact with Yarbough and speak to him occasionally. Only one witness testified that they heard about the tampering of Yarbough's truck prior to the election.

Analysis

Objection 2(b) is analyzed under the *Westwood* third party conduct standard because there is no evidence to support an inference that either party was responsible for the conduct in question.

The Employer failed to meet its burden for several reasons. First, the nature of the threat appears to be minimal. Unlike objection 2(a), this objection involves no violent or threatening conduct. The Employer did not present evidence that would suggest a reasonable employee

would have been unable to vote freely as a result of hearing about the alleged incident. Secondly, the Employer did not present any witnesses to testify regarding employee knowledge of the tampering to Yarbough's truck. As a result, there is little credible evidence of dissemination. The objection rests mainly on Yarbough's testimony. Yarbough did not testify that he told a substantial amount of employees. The Employer did not provide testimony from any employees who were aware of what happened to Yarbough's truck and any resulting intimidation with regard to the election. Accordingly, the Employer failed in its burden to prove that a general atmosphere of fear and reprisal was created so as to render a free election impossible. There is no basis for setting aside the election on this objection.

IV. **Objection 2(c)**

Facts

Objection 2(c) alleges that driver Phil Menendez, a known opponent of the Union, found his personal vehicle and work truck tampered with on several days prior to the election. In addition, the Employer alleges Menendez shared what happened to his truck and personal vehicle with other employees.

In support of the objection, the Employer presented Phil Menendez and Goss. Goss testified that Menendez voiced his opposition to the Union to him on several occasions. He also testified that Menendez made a statement which implied his opposition to the Union at captive audience meetings⁸. Menendez testified that he challenged drivers as to why they wanted to go against the contract they signed when they accepted employment.

Menendez explained a series of issues with his truck prior to the election. Menendez states the following incidents: 1) February 4, 2012, the fuel cap and diesel exhaust fluid cap (def

⁸ Goss could not recall any specifics of these statements. Therefore, I do not credit his recollection of Menendez publicly voicing his opposition to the Union. However, as set forth below, I do find Menendez's testimony regarding his public statements challenging employees regarding the Union credible.

cap) were missing from his truck which required the Employer to send the truck for repairs; 2) February 11, 2013, the fuel and DEF caps were missing which required the Employer to send the truck for repairs; 3) February 19, 2013, the glad hands holder was broken causing the glad hands to hang from truck; 4) Between January 8, 2013 and February 19, 2013, Menendez's truck was missing basic items such as tools, glasses, his MP3 player and a phone charger; 5) On January 21, 2013, Menendez's personal car alarm malfunctioned.

On direct examination, Menendez testified that he told about 10-15 drivers what happened to his truck and personal vehicle. Of the 10-15 drivers, he was able to recall 9 names during his testimony. After the Employer's attorney refreshed his recollection, he named one additional driver on re-direct examination.

During the Union's case, it presented five employees regarding this Objection, two of whom Menendez had previously identified as individuals he had spoken with about the damage to his vehicles. However, contrary to Menendez' testimony both employees denied hearing about the issues with Menendez's vehicles.

In addition, on cross examination, Menendez stated he told Pittard about what happened to his work vehicle. However, Pittard denied hearing about Menendez's issues with his truck during cross examination of his testimony.

The Employer did not present any employee witnesses, outside of Menendez, that testified to knowledge of the tampering to Menendez's vehicles and any resulting intimidation.

Analysis

There is no evidence to support an inference that either party engaged in the conduct in question. Accordingly, the objection must be considered under the *Westwood* third party conduct standard.

The Employer failed to meet its burden for this objection. As with objections 2(a) and (b), the Employer provided no testimony or evidence that employees were aware of the conduct in question. The Employer only presented Menendez who testified to telling 10-15 employees about the issues with his truck and personal vehicle. Assuming, *arguendo*, 15-20 employees heard the news of the tampering to his truck and personal vehicle, there is still an absence of evidence that would support a finding that there was a general atmosphere of fear which made employee free choice in the election impossible. The sheer number of employees who were made aware of the conduct is not the deciding factor if there is no evidence that these employees voted in a general atmosphere of fear. *See In re Accubuilt, Inc.*, 340 NLRB 1337 (2003) (Board assessed whether a general atmosphere of fear and reprisal existed in the Employer's plant, rather than merely comparing the numbers of employees subject to any sort of threats against the vote margin). In addition, the very nature of the conduct in question is not of a serious nature that would reasonably cause fear among the employees in the period before the election. Finally, as with objections 2(a) and (b), this conduct only affected one employee. Accordingly, the Employer failed in its burden to prove that a general atmosphere of fear and reprisal was created so as to render a free election impossible. There is no basis for setting aside the election on this objection.

V. Objection 2(d)

Facts

Objection 2(d) alleges a Union representative jumped on employee Mary Robertson's truck while she was driving, requested to speak with her about the Union and followed her back to the rail yard. The objection further alleges she reported the incident to other employees.

The Union concedes involvement in the conduct but disputes particular facts alleged in the objection.

The Employer did not present Robertson to testify⁹. The Employer presented Goss to testify concerning the objection. Goss testified that Robertson submitted a report following the incident describing what happened to her. The report, purportedly from Robertson, described a man jumping on her truck and requesting to talk to her about the Union. The report stated that she told the individual on her truck that it was inappropriate for him to be on her truck and said she did not have time to talk. The report stated that the individual followed her to the rail yard and she did not see where he went from there. The report described that it was a “scary” moment¹⁰.

Goss also testified that Robertson expressed her anti-union views to him as well as to other drivers. Goss based this on personal conversations with Robertson as well as alleged statements she made at captive audience meetings. Goss, however, could not recall what Robertson said at the meeting. He testified that her comments implied that she was against the Union but provided no further specifics. In addition, Goss did not testify with any specificity what Robertson said regarding her sentiment toward the Union in their personal conversations. Accordingly, I do not find this portion of his testimony credible. The Employer did not provide any witnesses that testified to hearing about the encounter between the Union representative and Robertson.

⁹ During the first day of the two day hearing, the Employer indicated Robertson would not be able to testify due to a sick child that was in the hospital. During the second day of the hearing, the Employer indicated Robertson was in the hospital, not a child. The Employer stated it decided not to press her to come to the hearing because she could still be ill.

¹⁰ As set forth fully below, the Employer did not present the contents of this report through Robertson’s live testimony at the hearing and therefore, it was not subject to cross examination. Accordingly, I do not credit the statement for the truth of the matter asserted in the report. I credit the live testimony the Union provided in rebuttal.

The Union provided testimony from Union Organizer Marco Salgado. Salgado admits to approaching Robertson's truck while it was stopped. He admits to startling her but testified that he apologized for scaring her and the two engaged in a conversation about the Union. Salgado adds that Robertson suggested he follow her to the rail yard so they could continue their conversation there. Salgado stated that they met for 15-20 minutes and she spoke positively about the Union and was looking forward to better working conditions.

The Union provided testimony from two employees who spoke with Robertson and heard her mention she was in favor of the Union. The Union also provided testimony from an employee that worked directly with Robertson and heard Robertson exclaim that they needed a union after she had difficulty with some equipment. The Employer did not provide testimony to rebut the Union's witnesses.

Analysis

The Employer did not meet its burden in demonstrating the election should be set aside based on the Union's conduct in objection 2(d). As stated above, the Union concedes that its representative approached Robertson regarding the Union prior to the election. In evaluating party conduct during the critical period, the Board applies an objective standard, under which conduct is found to be objectionable if it has the tendency to interfere with the employees' freedom of choice. *Cambridge Tool and Mfg.*, 316 NLRB 716 (1995). In deciding whether such interference has occurred under this standard, the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining units; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the closeness of

the final vote; (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 157, 158 (2001).

The Employer relies solely on Goss' testimony regarding his conversations with Robertson and Robertson's report regarding her encounter with the Union representative. The contents of the report were not subject to cross examination. The Board has limited the use of documents entered into the record through a business record exception, if it lacks trustworthiness. *See Avondale Industries, Inc.*, 329 NLRB 1064, 1083 (1999) (Business record setting forth management reasons for discharge not accepted for the truth of the matter because available sworn testimony was preferred). In the instant case, Robertson did not provide sworn testimony on any of facts surrounding the Employer's objection. Accordingly, I do not credit the recollection of the encounter between the Union representative and Robertson as set forth in the report. Conversely, because of his command of facts, credible demeanor and unchallenged testimony, I credit Union Organizer Salgado's testimony regarding the encounter between him and Robertson.

Assuming, *arguendo*, I credit Robertson's written report regarding the encounter between her and the Union representative, the Employer still failed to provide any testimony that employees were aware of the encounter and whether the encounter was serious or threatening. The report does not indicate that Robertson shared the information with any other employee. Because the Employer failed to provide evidence that employees knew of the encounter, there is simply no link that would support a finding that the encounter had a tendency to interfere with the employee's choice in the election. Therefore, there is no basis for setting aside the election on this objection.

VI. Conclusion

In view of the above, it is the conclusion and recommendation of the undersigned that the Employer's Objections should be overruled in their entirety and the International Brotherhood of Teamsters, Local 705 should be certified as the exclusive collective bargaining representative of the petitioned unit.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this HEARING OFFICER'S REPORT ON OBJECTIONS was served by regular mail this 16th day of May, 2013 on the following:

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