UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CINTAS CORPORATION, -and- LOCAL 550, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	Case No. 29-RC-11769

LOCAL 550'S ANSWER TO EMPLOYER'S
EXCEPTIONS TO THE REPORT ON OBJECTIONS

Hope Pordy
SPIVAK LIPTON LLP
1700 Broadway, 21st Floor
New York, NY 10019
Ph: (212) 765-2100
Fax: (212) 765-8954
hpordy@spivaklipton.com
Attorneys for Petitioner Local 550,
International Brotherhood of Teamsters

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

CINTAS CORPORATION,

Employer,

-And -

Case No. 29-RC-11769

LOCAL 550, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Petitioner.

LOCAL 550'S ANSWER TO EMPLOYER'S EXCEPTIONS TO THE REPORT ON OBJECTIONS

Petitioner, Local 550, International Brotherhood of Teamsters ("Local 550" or "the Union"), by and through its attorneys, Spivak Lipton LLP, submits the following Answer to the Employer's Exceptions to the Report on Objections, dated September 23, 2009.

BACKGROUND

On August 6, 2009, Local 550 won an election to represent the employees at the Queens facility of Cintas Corporation ("Employer") by a vote of 29 to 25. There were no challenged ballots. Subsequent to the election, Employer filed an Objection to the election based on alleged unlawful conduct by a Service Training Coordinator ("STC"), Phil Avanzato ("Avanzato"). Through the Employer's submission of an affidavit by a former employee (Resp. Brief, Exhibit A), Avanzato is alleged to have said that "things will get shaken up around here when the union comes in" and "wait until the union gets in." By the same affiant, Avanzato is also alleged to have told a single employee that

"they will send someone down if you did not sign up yet," purportedly in regards to the union's collection of authorization cards. This affiant-employee ceased employment with the Company on June 6, 2009, and was not eligible to vote in the election.[1] Indeed, the statements attributed to Avanzato were made prior to June 6, 2009 – more than one month prior to the filing the petition on July 6, 2009.

In the Report on Objections ("Report"), the Regional Director Alvin Blyer recommended overruling the Employer's Objection and certifying Local 550 as the exclusive bargaining agent of the unit employees. In regards to the statements that "things will get shaken up" and "wait until the union gets in," the Regional Director notes that these statements predated the critical period between the filing of the petition and the election by more than a month and therefore, under the Board's ruling in Ideal Electric Manufacturing Co., 134 NLRB 1275 (1961), cannot constitute objectionable conduct. (Report at p. 4.) Further, the Regional Director found that the STC's statements constituted "permissible expressions of opinion" under Werthan Packing, Inc., 345 NLRB 343 (2005), rather than objectionable pro-union conduct. (Report at p. 5.) In so finding, the Regional Director concluded that the STC's statement did not express a preference for unionization. (Report at p. 5.)

Regarding the alleged solicitation of union cards, the Regional Director considered the Board's decision in Harborside Health, 343 NLRB 906, 911 (2004), and its view that the "supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to chose to sign a card or not," but did not find that the Employer's evidence demonstrated that Avanzato actually solicited

---

[1]Unit employees eligible to vote had to be employed during the payroll period ending July 11, 2009 (Stipulated Election Agreement, paras. 2 and 12).

any cards. (Report at p. 7.) In fact, the Regional Director found that Avanzato's alleged statement – "they will send someone down if you did not sign up yet" – to be evidence that the employee was advised that someone other than Avanzato would provide him/her with an authorization card. (Report at p. 7.) The Regional Director concluded that Avanzato's statements neither promoted nor condemned the Union, and that the Employer failed to proffer any evidence that Avanzato solicited authorization cards from employees or used his supervisory status to coerce employees into supporting the union. (Report at p. 7.)

On September 23, 2009, the Employer filed Exceptions to the Report on Objections requesting that the Board either rerun the election or hold a hearing on certain issues. The Employer argued that (1) the Regional Director erred by ignoring the Board's mandate that "absent mitigating circumstances," supervisory solicitation of authorization cards have an "inherent tendency" to interfere with employee's freedom to choose to sign a card; (2) the Regional Director erred in summarily dismissing the Avanzato's pro-union conduct because it occurred outside the critical period and was merely opinion; and (3) the Regional Director erred by failing to definitively conclude that the STCs were statutory supervisors.

For the reasons set forth below, the Employer's exceptions should be dismissed and the Regional Director's recommendations should be adopted by the Board in their entirety.

ARGUMENT

In determining whether to set aside an election on the basis of partisan supervisory activity during a union organizational effort, "the root question is whether the conduct had a reasonable tendency to interfere with employees' free choice to such an extent that it materially affected the results of an election." Madison Square Garden CT, LLC, 350 NLRB 117, 119 (2007) (emphasis added). "[T]he burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.... An objecting party must show by specific evidence not only that improper conduct occurred, but also that it interfered with the employee's exercise of free choice...." Sonoma Health Care Center, 342 NLRB 933 (2004). Here, the Employer fails to carry this "heavy" burden for its evidence does not show that any pro-union supervisory conduct occurred nor that any purportedly objectionable conduct may have materially affected the results of the election.

I. THE REGIONAL DIRECTOR ADHERED TO BOARD PRECEDENT RECOMMENDING THE DISMISSAL OF THE EMPLOYER'S OBJECTION CONCERNING THE ALLEGED SOLICITATION OF CARDS. (SEE EXCEPTIONS 1-5)

The Regional Director, relying upon the standard enunciated by the Board in Harborside, 343 NLRB 906 (2004), correctly recommended the dismissal of the Employer's Objection concerning the alleged solicitation of cards by Avanzato on the bases that there was no evidence that he solicited cards, and that his alleged statement neither promoted nor condemned support for the Union. (Report at pp. 6-7.)

The Employer contends that "the Report gives undue weight to the fact that Avanzato indirectly solicited authorization cards." (Exception No. 2). The Employer's

contention is baseless as the Regional Director did not make any finding that Avanzato solicited cards, either directly or indirectly. Rather, the Regional Director found that the evidence supported an inference that someone other than Avanzato was involved in the solicitation of cards. (Report at p. 7.) Nevertheless, the Employer argues that that Regional Director improperly differentiated between the direct and indirect solicitation of cards, and "disregarded" the Board's mandate in Harborside, that "absent mitigating circumstances" supervisory solicitation of authorization cards has an "inherent tendency" to interfere with Employee's freedom to chose to sign a card or not.

The Employer's argument does not comport with Harborside and other applicable Board law. Notably, unlike previous cases in which the Board found objectionable solicitation, here there were no coercive action by a supervisor. See, e.g., Chinese Daily News, 344 NLRB 1071, 1071-72 (2005) (coercion found where the supervisor personally distributed the cards to employees, watched as they signed, collected them and turned them into the union); SNE Enterprises, Inc., 348 NLRB 1041, 1043 (2006) ("coercive supervisory card-solicitations" where the supervisors directly asked employees to sign cards); Harborside Health, 343 NLRB at 913 (supervisor's continuous, pervasive and aggressive campaign activities – including personally soliciting authorization cards – had a reasonable tendency to coerce employees). Here, Avanzato did not request that the employee sign or submit an authorization card. Rather, the Employer's evidence indicates only that Avanzato told the employee that "they will send someone down if you did not sign up yet." (Employer Brief, Exhibit A.) There is no other evidence of what was said during this purported conversation, either before or after. This single (alleged) statement does not rise to the level of solicitation

as recognized by the Board. The statement can only be reasonably characterized as neutral and does not give rise to any inference of coercion or intimidation sufficient to support a finding of objectionable conduct.

Further, assuming *arguendo* that Avanzato's statement to the employee qualifies as solicitation, this is still an inadequate basis to overturn the election results because the alleged solicitation did not materially affect the outcome of the election. According to the Employer's evidence, the alleged solicitation was only directed towards a single employee, and there is no evidence that any other employees were either present at the time or learned of it later. Moreover, the employee allegedly indirectly solicited by Avanzato resigned a month prior to the filing date of the petition, and two months before the election occurred. In Harborside, the Board explained that "the impact of the supervisor's solicitation would ordinarily continue to be felt during the critical period ... [because] the employees 'would feel obliged to carry through on their stated intention [i.e. the card] to support the union.'" Harborside Health, 343 NLRB at 912 (emphasis added). In Harborside, and specifically in connection with the exception to Ideal Electric with regards to supervisory solicitation of union authorization cards, the Board repeatedly expressed its concern about the impact such solicitation would have on the affected employee during the critical period. Id. Here, however, as the employee who was allegedly solicited resigned well before the critical period, the presumed "ordinary" pressure on the employee during the critical period of which the Board was concerned about in Harborside was not present. Hence, the alleged solicitation had no material impact on the election.

When considering whether the coercive solicitation of authorization cards materially affected the outcome of an election, the Board will consider whether the numbers of solicited employees was greater than the margin of victory. See SNE Enterprises, 348 NLRB 1041, 1044 (2006) (holding that since the number of employees solicited and employees who knew of the solicitation was greater than the union's margin of victory, the solicitation materially affected the outcome of the election); Werthan Packaging, Inc., 345 NLRB 343, 345 (2004) (the union failed to carry its burden of establishing objectionable conduct warranting a new election where evidence showed that supervisor only discouraged a single employee from signing an authorization card on one occasion, and this was insufficient to affect the outcome of the election). Here, the Union won the election by four votes, but the Employer only alleges that Avanzato solicited a single employee who ceased employment one month before the petition was even filed and did not even vote in the election. Thus, the alleged solicitation could not have "materially affected the results of the election."

Accordingly, the Employer's Exceptions Nos. 1-5 should be rejected, and the Board should adopt the Regional Director's recommendation overruling the objection.

II. THE REGIONAL DIRECTOR PROPERLY RECOMMENDED THE DISMISSAL OF THE EMPLOYER'S OBJECTION BECAUSE THE ALLEGEDLY PRO-UNION STATEMENTS MADE BY THE STC PRIOR TO THE CRITICAL PERIOD WERE PERMISSIBLE EXPRESSIONS OF OPINION (SEE EXCEPTIONS 6-7)

The Employer also argues that the Regional Director erred by recommending dismissal of its Objection based upon Avanzato's statements, i.e., "this will shake things up" and "wait until the union gets in" (Exception No. 6). The Regional Director

found that these statements constitute permissible statements of opinion under Harborside, 343 NLRB at 910-11, and Werthan Packaging Co., 345 NLRB 343, 345 (2005).[2] (Report at p. 5.) As the Regional Director noted, the Board in Harborside observed that the supervisor's "ability to both reward and retaliate against employees, together with her repeated and confrontational references to job loss, could reasonably lead .... employees to believe that she was not merely expressing her personal opinion, but predicting a real prospect they could lose their jobs." Harborside, 343 NLRB at 910-11. In contrast, here, Avanzato allegedly only commented that "this will shake things up." He did not make any statements regarding the effect of unionization on the employees' job security or otherwise make any promise or threat based upon the employees' support for the Union. Moreover, as stated above, it is unclear from the statements whether Avanzato even supported "shaking things up." Rather, his statements on their face are neutral statements that the Union will change things, for better or for worse. Even comments that indicate a bias, but do not contain any threat or warning, are permissible expressions of opinion during an organizational campaign. See, e.g., Werthan Packaging, 345 NLRB at 344, n. 4.

Further, the Employer highlights a flaw in its argument by relying upon Madison Square Garden and the Board's recognition that "when a supervisor engages in pro-union activity, that the 'continuing relationship' between the supervisor and an employee

---

[2] The Employer attempts to distinguish Werthan from the present matter on the basis that Werthan concerned "*anti-union*" statements, whereas the present case concerns allegedly pro-union statements. Thus, the Employer seems to advocate for different standards for evaluating pro-union and anti-union conduct. However, as the Board made clear in Werthan, there is no such "double standard." Werthan, 345 NLRB at 345, n.7.

creates a possibility that an employee could be "coerce[d] into supporting the union out of fear of future retaliation by a union-oriented supervisor." Madison Square Garden 350 NLRB at 119. As has already been discussed, there was no "continuing relationship" between Avanzato and the affected employee as he/she ceased employment on June 6, 2009. The Employer failed to produce evidence from any actual voter, or current employee who witnessed any pro-union supervisory conduct by Avanzato or any other supervisor. Hence, Avanzato's alleged comments do not carry the Employer's heavy burden for showing improper conduct warranting the setting aside of the August 6th election results.

III. THE REGIONAL DIRECTOR DID NOT NEED TO "DEFINITIVELY CONCLUDE" THAT THE STC'S ARE "STATUTORY SUPERVISORS" IN ORDER TO RECOMMEND DISMISSAL OF THE EMPLOYER'S OBJECTIONS. (SEE EXCEPTION 8)[3]

The Employer contends that the Regional Director erred by failing to definitively rule that the STCs were statutory supervisors, arguing that for the purposes of analyzing the STC's conduct under Harborside, it was important that the Regional Director render a conclusion as to the supervisory status of STC's. However, the Regional Director was clear that for the sake of his analysis he would "assum[e] [the STC] possesses sufficient supervisory authority to satisfy the standard announced in Harborside." (Report at p. 5.) Thus, the Regional Director conducted his analysis assuming *arguendo* that the STC

[3] Contrary to the Employer's assertion, the Union did not stipulate that the STC's were statutory supervisors, and in fact, expressly reserved its right to pursue any action or claim asserting that the STC's, among other employees, are not Section 2(11) supervisors. See, e.g., Caymon Candy Company, 199 NLRB 547, Cruis Along Boats Inc., 128 NLRB 1019. A copy of the correspondence memorializing the Union's position is appended hereto as Appendix A.

was a statutory supervisor, and even then found no objectionable conduct. There was no need to "definitively" rule that the STC is a statutory supervisor, and the Employer's Exception is without merit.

IV. UNDER RULE 102.69, THE REGIONAL DIRECTOR HAS THE DISCRETION TO DECIDE WHETHER A HEARING MAY BE NECESSARY. (SEE EXCEPTION 4, 7, AND 8)

Throughout the Employer's brief in Support of its Exceptions to the Report on Objections, the Employer argues that the Regional Director erred by not conducting a hearing on its objection prior to issuing his recommendations. However, such a hearing was neither required under the law nor warranted by the facts of this case. Under Section 102.69(d), "the Regional Director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer."[4] A hearing will only be held with respect to those objections "which the Regional Director concludes raise substantial and material factual issues." Thus, it is entirely within the Regional Director's discretion to determine whether there are substantial and material issues of fact necessitating a hearing. Where, as here, the Regional Director concludes after investigation that the objecting party fails to raise any such issues of fact, the Regional

---

[4] Section 102.69(d) of the NLRB's Rules and Regulations states in full:

In issuing a report on objections or on challenged ballots, or on both, following proceedings under section 102.62(b) or 102.67, or in issuing a decision on objections or on challenged ballots, or on both, following proceedings under section 102.67, the Regional Director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues.

Director properly exercises his discretion not to conduct a hearing and issue a Report recommending the dismissal of the unsupported objection.

CONCLUSION

Neither the Employer's Objection nor its Exceptions to the Regional Director's Report have any basis in fact or law. Accordingly, the Employer's Exceptions should be rejected, in their entirety; the Board should adopt the Regional Director's Report on Objections; and the appropriate certification should be issued.

Dated: New York, New York
October 7, 2009

Respectfully submitted:

By: _____
Hope Pordy

Spivak Lipton LLP
1700 Broadway, 21st Floor
New York, New York 10019
Ph: 212.765.2100
Fax: 212.541.5429
Attorneys for Petitioner Local 550, International Brotherhood of Teamsters

APPENDIX A

SPIVAKLIPTON LLP
ATTORNEYS AT LAW

Hope Pordy
hpordy@spivaklipton.com

1700 Broadway
New York, NY 10019
T 212.765.2100
F 212.765.8954
spivaklipton.com

July 13, 2009

VIA FACSIMILE & FIRST CLASS MAIL
David Stolzberg, Esq.
National Labor Relations Board
Region 29
Two MetroTech Center, Fifth Floor
Brooklyn, New York 11201

Re: Local 550, IBT and Cintas Corp.
Case No. 29-RC-11769

Dear Mr. Stolzberg:

Enclosed please find the Stipulated Election Agreement, signed by Local 550, in connection with the above-referenced matter.

As per our discussions with your office, the Union has agreed to sign the Agreement on the condition that the job titles/classifications listed as excluded from the unit are not deemed to be supervisors within the meaning of Section 2(11) of the Act as a result of this Election Agreement. The Union hereby expressly does not waive, and reserves any and all rights, to pursue any action or claim asserting that these employees are not Section 2(11) supervisors. *See, e.g.,* Laymon Candy Company, 199 NLRB 547; Cruis Along Boats, Inc.,128 NLRB 1019.

Thank you for your assistance.

Sincerely,

Hope Pordy /DD

Hope Pordy

Enclosure
cc: Alvin Blyer, Regional Director
Robert Maxwell, Esq., Attorney for Cintas
Richard J. Volpe, Local 550 Secretary-Treasurer
Billie Lee Whelan, Local 550 Vice President

Form NLRB-652

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STIPULATED ELECTION AGREEMENT

The parties agree that a hearing is waived, that approval of this Agreement constitutes withdrawal of any notice of hearing previously issued in this matter, that the petition is amended to conform to this Agreement, and further **AGREE AS FOLLOWS:**

1. **SECRET BALLOT.** A secret-ballot election shall be held under the supervision of the Regional Director in the unit defined below at the agreed date, time and place, or if postponed or canceled at such rescheduled date, time and place determined by the Regional Director in his discretion, under the Board's Rules and Regulations.

2. **ELIGIBLE VOTERS.** The eligible voters shall be unit employees employed during the payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Also eligible to vote are employees in the military services of the United States who appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period for eligibility, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. The employer shall provide to the Regional Director, within 7 days after the Regional Director has approved this Agreement, an election eligibility list containing the full names and addresses of all eligible voters. ***Excelsior Underwear, Inc.***, 156 NLRB 1236. In the event the election will take place at multiple locations where two or more polling places will be open simultaneously, the employer shall provide a separate ***Excelsior*** list for each location. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.) at each location. In the event the election will be conducted by mail ballot, it is requested that one copy of the ***Excelsior*** list be furnished in the form of mailing labels, if possible, for use by the Regional Office in mailing the voting kit to employees. While the employer is not required to comply with this request for mailing labels, your cooperation in doing so will assist in promptly sending mail ballots to each employee's correct address and maximize employee participation in the election.

3. **NOTICE OF ELECTION.** The Employer shall post copies of the Notice of Election in conspicuous places and usual posting places easily accessible to the voters at least three (3) full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed. Notices will be posted in English.

4. **ACCOMMODATIONS REQUIRED.** All parties should notify the Regional Director as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, and request the necessary assistance.

5. **OBSERVERS.** Each party may station an equal number of authorized, nonsupervisory-employees to serve as observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

6. **TALLY OF BALLOTS.** Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

7. **POSTELECTION AND RUNOFF PROCEDURES.** All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

8. **RECORD.** The record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

Form NLRB-652

9. **COMMERCE.** The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c). (*Insert commerce facts.*)

Cintas Corporation, herein called the Employer, a domestic corporation with its principal place of business located at 5570 Ridge Avenue, Cincinnati, Ohio, and with a place of business located at 12 Harbor Park Drive, Port Washington, New York, herein called the Port Washington facility, is engaged in the business of supplying uniforms, logo mats and related products to corporate customers in the United States and Canada. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, purchased and received at its Port Washington facility, goods and supplies valued in excess of $50,000 from entities located outside of the State of New York. The Employer is engaged in commerce within the meaning of the Act.

10. **LABOR ORGANIZATION(s).** Local Union No. 550, International Brotherhood of Teamsters, herein called the Petitioner, is an organization in which employees participate, and which exists, in whole or in part, for the purpose of dealing with employers concerning wages, hours and other terms and conditions of employment. The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

11. **WORDING ON THE BALLOT.** When only one labor organization is on the ballot, the choice shall be "Yes" or "No". If more than one labor organization is on the ballot, the choices shall appear as follows, reading left to right or top to bottom.

12. **PAYROLL PERIOD FOR ELIGIBILITY.**

THE PERIOD ENDING: July 11, 2009

13 **DATE, HOURS, AND PLACE OF ELECTION.**

DATE: August 6, 2009
HOURS: 5:00 a.m. to 7:00 a.m., and 8:30 p.m. to 10:00 p.m.
PLACE: The second floor conference room at the Employer's facility located at 12 Harbor Park Drive, Port Washington, New York.

14. **THE APPROPRIATE COLLECTIVE-BARGAINING UNIT.**

Included: All full-time and regular part-time service sales representatives, route skippers, shuttle drivers, warehouse loaders and unloaders, and new account installers employed by the Employer at its facility located at 12 Harbor Park Drive, Port Washington, New York.

Excluded: All sales representatives, office clerical employees, guards, and service training coordinators, route check-in coordinators, management trainees, managers, and other supervisors as defined in Section 2(11) of the Act.

CINTAS CORPORATION

(Employer)

By _____
(Name) (Date)

LOCAL UNION NO. 550, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

~~(Petitioner)~~

By _____ 7/13/09
(Name) (Date)

Recommended:

_____
(Board Agent) (Date)

Date approved _____

_____

Regional Director,
National Labor Relations Board
Case No. 29-RC-11769

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she caused a true and correct copy of Petitioner's Answer to Employer's Exceptions to Ruling on Objections to be served upon following parties by electronic mail and overnight mail on this 7th day of October, 2009:

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-00001
(original and 8 copies)

Paul Galligan, Esq.
Seyfarth Shaw LLP
620 Eighth Avenue
New York, NY 10018

Alvin P. Blyer, Regional Director
Region 29
National Labor Relations Board
Two MetroTech Center, Fifth Floor
Brooklyn, New York 11201

By: _____
Hope Pordy