UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CINTAS CORPORATION
Employer

and **Case No. 29-RC-11769**

LOCAL 550, INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Petitioner

Hope A. Pordy, Esq., Counsel for the Petitioner
Paul Galligan, Esq., and Joel H. Kaplan, Esq., Counsel for the Employer

DECISION ON OBJECTIONS

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York City on March 17, 2010.

The Petition in this case was filed on July 6, 2009. Pursuant to a Stipulated Election Agreement approved by the Regional Director on July 13, 2009, a secret ballot election was conducted on August 6, 2009. The unit consisted of:

> All full-time and regular part-time service sales representatives, route skippers, shuttle drivers, warehouse loaders and unloaders, and new account installers employed at the employer's facility located at 12 Harbor Park Drive, Port Washington, New York, but excluding 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.

The Tally of ballots showed that out of approximately 61 eligible voters, 29 voted for the Union and 25 voted against union representation.

On August 13, 2009, the Employer filed Objections to the Election. It alleged that the "Union was improperly assisted in its organizing campaign by supervisors who engaged in pro-union conduct and who assisted the Union in its collection of authorization cards to demonstrate the showing of interest and tainted said showing of interest."

In support of its Objections, the Employer submitted to the Regional Director two affidavits. One of these was by its general manager who asserted that an individual named Phil Avanzato possessed the authority of a supervisor as defined in the Act. The second affidavit was from an employee and the Employer claims that this shows that Avanzato (a) made coercive statements to employees in support of the Union and (b) that he solicited union authorization cards from employees.

Based on the Employer's submission, the Regional Director, on September 9, 2009, issued a Report on Objections finding that the Employer "has not presented sufficient evidence to support a prima facie case in support of its objections."

The Employer appealed that Decision and on February 16, 2010, the Board issued a Decision whereby it ordered that a hearing be held on the Employer's objections.

In preparation for the hearing, the Employer and the Union each issued subpoenas to compel various people to be present at the hearing and/or to produce certain documents. In this regard, the Employer asserts that it discovered that Syam Ali, the individual who gave the affidavit submitted to the Regional Director, no longer had the same cell phone number and was employed at a job that took him outside the State of New York. The Employer made efforts to locate Ali who still resided, part-time, at the address that was in the Company's personnel files. It appears that through Ali's mother, who also lived at this address, the Employer's counsel managed to contact Ali who said that he could not appear at the hearing scheduled for March 17, 2010. This contact seems to have occurred during the week before the hearing. I am not sure why the Employer, knowing that this witness was crucial to its case, did not make better efforts to maintain contact with Ali or why it was only until the week before the scheduled hearing that contact was made only to discover that he would not voluntarily appear.

In any event, at the opening of the hearing, the Employer made several suggestions regarding the Ali situation. The Employer suggested as its first option that we should postpone the hearing until some time in April 2010 when it could obtain Ali's voluntary appearance. The second option was that we could set up a conference call during the hearing so that Ali could pull over to the side of the road and his testimony could be taken telephonically. The third option was that his previously submitted affidavit be entered into evidence on the basis that Ali was not available. Counsel for the Respondent asserted that when he talked to him, Ali confirmed that any testimony he would give would be the same as contained in his affidavit. The Union objected to all of these proposals.

None of these options were particularly attractive to me. First, the election in this case was held more than 8 months ago and any further adjournment of the hearing would, in my opinion, be unduly prejudicial to both parties and to the employees who voted in the election. The second option, involving taking testimony by telephone has been rejected by the Board, unless done by mutual consent. *Westside Painting*, 328 NLRB 796 (1999). In the absence of face to face contact when being subject to cross examination, this method of taking testimony is, in my opinion, fraught with the danger of unreliability. The third option of receiving Ali's affidavit in lieu of his testimony and without an opportunity for cross examination was equally unappealing and I do not think that the Employer demonstrated his unavailability as that term is used in the Federal Rules of Evidence.

Nevertheless, given the need to hear and decide this case within a reasonable period of time after the election, I decided to receive Ali's affidavit into evidence over the Union's objections with the caveat that I would give it less weight than normal if there was a material credibility issue presented by other witnesses. Both parties stated that they could live with this.

The Union did not put on any witnesses to controvert the statements made in Ali's affidavit and therefore I conclude that they are true. In substance, Ali's affidavit, which was

taken by Respondent's counsel after having been given the proper *Johnny's Poultry* assurances, [1] states as follows:

> I was employed by Cintas from September 2, 2008 to June 6, 2009. My last position was as a warehouse employees and I resigned in June 2009. I was working for Cintas when the union organized the Port Washington facility. I was part of the bargaining unit that the Teamsters petitioned for.
>
> While the Teamsters were collecting authorization cards to organize our facility, I witnessed a Service Training Coordinator named Phil Avanzato making statements that I interpreted as supporting the union and helping the union collect authorization cards from Cintas employees. Specifically, he told employees in my presence that "things will get shaken up around here when the union comes in" as well as the statements such as "wait until the union gets in" and "this will shake up the company." On one occasion while on a smoking break, Phil told me that "they will send someone down if you did not sign up yet." I understood from this conversation that Phil was helping the union collect authorization cards and given that he is a supervisor, I thought this was unusual.

I note that as a warehouse employee, Ali was not supervised by Avanzato or any other Service Training Coordinators.

Even assuming that Avanzato was a supervisor within the meaning of the Act, [2] it is my opinion that there is nothing contained in Ali's affidavit that can reasonably be construed as the type of pro-union supervisory statements that the Board found objectionable in *Harborside Healthcare, Inc*. 343 NLRB 906 (2004), or in any of the cases cited therein. In *Harborside,* the Board held that statements made by pro-union supervisors need not be accompanied by express threats of reprisal; but could be objectionable if they amounted to "implicit threats or coercion," or were "implied threats of retaliation." Indeed in *Harborside*, the facts showed that the pro-union supervisor involved in that case, continuously harped on the possibility of employees losing their jobs.

Nor can I conclude that any reasonable person could view any part of Ali's statement as amounting to evidence that Avanzato solicited employees to sign union authorization cards. He simply didn't according to Ali's statement. At most, it simply shows that Avanzato told Ali that if he hadn't signed a card yet, someone else would ask him to sign one in the future.

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[1] 146 NLRB 770 (1964)

[2] In my opinion, the testimony presented by the Employer failed to establish that Avanzato was a supervisor within the meaning of Section 2(11) of the Act. The testimony showed that Avanzato was an Internal Service Training Coordinator, which is a different job than a Service Training Coordinator. As an Internal Service Training Coordinator, Avanzato's contact with the sales representatives, (whom he allegedly supervised), was limited to the time when they returned to the facility after doing their routes in the field. In this regard, his role was to process their accounts upon return, making sure that their accounting and inventory were in proper order. At most, the testimony was that Avanzato could be one of about 4 or 5 people who interviewed applicants for hire and that he participated in a consensus based decision to hire new employees. The Employer introduced into evidence documents showing that Avanzato had either disciplined employees or had evaluated their performance. But all of these were issued at a time when he occupied a different position than the one he occupied at the time of the organizing campaign. In short, the employer has the burden of proving that Avanzato was a statutory supervisor and it has failed to meet that burden.

In view of the above, I conclude that the evidence contained in Ali's affidavit, which was the basis for the filing of the Objections and presumably the Board's Order to hold a hearing, cannot support any contention that the Election should be set aside because of pro-union supervisory conduct or pro-union supervisory solicitation of union authorization cards.

Notwithstanding the above, the Employer argued and I agreed, over the Union's opposition, that the Objections were broad enough so that the Employer could offer evidence by other witnesses of other supervisory pro-union statements or union card solicitation. In short, I concluded that the Employer was not limited in its proof to the evidence contained in Ali's affidavit or limited only to statements allegedly made by Avanzato.

With this ruling, the Employer's counsel then sought to call the Union's business agent as a witness and to require her to produce documents which in his opinion, would show that various company supervisors solicited and/or obtained union authorization cards from employees. In my opinion, the Employer's counsel, having no witnesses of his own, was attempting to conduct its investigation during this hearing. I instructed Counsel that he had ample opportunity from the date of the election until the hearing date to interview employees and supervisors and find evidence, (if any existed), to support this position. I therefore refused to allow Counsel to engage in a "fishing expedition" during the hearing in an attempt to discover potential witnesses or evidence that was readily available before the hearing. I also reiterated my previous decision to revoke the Employer's subpoena to the Union. See Attached Exhibit A.

The Employer made an offer to prove that if allowed to testify, the Union's agent would essentially confess *inter alia* that supervisors were involved in the union campaign that supervisors attended and participated at union meetings and that supervisors directly solicited union authorization cards from employees. The Employer offered no basis for why he believed that this witness might conceivably testify in this manner. Moreover it is apparent to me, by his failure to call any of his own witnesses on these subjects, (*including supervisors who apparently were present at the hearing*), that this offer of proof had no underlying factual basis at all.

Accordingly, based on the above and the record as whole, I conclude that the Employer's Objections have no merit and should be dismissed.

ORDER

The representation case in 29-RC-11769 is be remanded to the Regional Director of Region 2, for the purpose of issuing the appropriate Certification. [3]

Dated, Washington, D.C., April 16, 2010.

Raymond P. Green
Administrative Law Judge

[3] Any party may, within fourteen (14) days from the date of issuance of this recommended Decision, file with the Board in Washington, DC, an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 2. Exceptions must be received in Washington by April 30, 2010. If no exceptions are filed, the Board will adopt the recommendations set forth herein.

Appendix A

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ORDER

On March 12, 2010, the Petitioner filed a Petition to Revoke a Subpoena issued to it by the Employer.

In support of its Objections, the Employer filed with the Regional Director an affidavit that offered to prove that an individual named Phil Avanzato was a supervisor and that he **(a)** solicited union authorization cards from employees and **(b)** that before June 16, 2010, he made statements to employees that interfered with the conduct of the election.

By the terms of its Subpoena, the Employer basically proposes to conduct an open ended investigation into the entire election campaign that was conducted by the Union before the petition was filed and up until the time of the election. The subpoena calls on the Union to divulge, *inter alia*, the names of all individuals, including employees of the Respondent who were involved in its organizing campaign; any and all communications made by the Union to employees or supervisors; internal documents that would disclose the Union's organizing strategy; any documents that were supplied by employees of the Company to the Union; and the disclosure of those employees who signed union authorization cards. The information and documents called for by the Subpoena are for the most part confidential and essentially irrelevant to the narrow issues in this case. Indeed, although I almost never use this term, the subpoena essentially is a "fishing expedition" that could potentially enlarge the scope of this hearing beyond what the Employer offered to prove when it filed its Objections.

For the reasons stated above, the Petition to Revoke is granted.

March 15, 2010

/s/ Raymond P. Green
Raymond P. Green
Administrative Law Judge