

**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

**EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO
THE REPORT ON OBJECTIONS**

Paul Galligan
SEYFARTH SHAW LLP
620 Eighth Avenue
New York, New York 10018
(212) 218-5500
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**RESPONDENT'S BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE REPORT ON OBJECTIONS**

The Employer, CINTAS CORPORATION, ("Employer" or "Cintas"), by its attorneys, Seyfarth Shaw LLP, hereby submits this Brief in support of its Exceptions to the Report on Objections ("Exceptions").

STATEMENT OF THE CASE

Petitioner won an extremely close election to represent the employees at Cintas' Queens facility on August 6, 2009 (the vote was 29-25 in favor of the Petitioner). Subsequent to the election, Cintas discovered that at least one of its Service Training Coordinators ("STC"), Phil Avanzato ("Avanzato") had unlawfully assisted Petitioner in its organizing campaign. The STCs had been excluded from the petitioned for unit in the Stipulated Election Agreement as supervisors, so Cintas filed timely Objections pursuant to Section 102.69 of the Board's Rules and Regulations, relying on the recent Board decision in *Harborside Healthcare*, 343 NLRB 906, 176 LRRM 1113 (2004). Within the seven day period set forth in section 102.69, Cintas produced evidence showing (a) STCs were statutory supervisors, and (b) STC Avanzato unlawfully assisted Petitioner in the solicitation and collection of authorization cards and engaged in other pro-union conduct.

Regarding Avanzato's unlawful conduct, Cintas produced an affidavit from a former employee who was part of the petitioned for unit and who offered direct evidence that Avanzato told employees that "things will get shaken up around here when the union comes in" and "wait until the union gets in" and "this will shake up the company."¹ Further, Avanzato solicited employees to sign Petitioner's authorization cards, informing the affiant that "they will send someone down if you did not sign up yet." Ex. A. The Regional Director rejected Cintas's Objections in his Report on Objections, dated September 9, 2009 ("Report") without even conducting a hearing on the effect Avanzato's conduct had on such a close election. The Regional Director completely disregarded Avanzato's pro-union comments solely on the basis that they occurred prior to the critical period, even though they were clearly connected to the organizing campaign. The Regional Director also did not follow the holding in *Harborside* and failed to analyze Avanzato's solicitation of cards as having an "inherent tendency" to interfere with employees' freedom of choice.

Given the extremely close election, Avanzato's conduct alone warrants a rerun election. As the employee affidavit makes clear, Avanzato was actively engaged in campaigning for the Petitioner at the facility and assisted the Petitioner in collecting signed authorization cards to obtain a showing of interest. In his Report, the Regional Director failed to give any weight to the affidavit, viewing Avanzato's pro-union comments in isolation from his solicitation of cards and summarily dismissed both on technical grounds. Critically, the Regional Director ignored the mandate of *Harborside Healthcare*, to look at the inherently coercive nature of supervisory conduct, particularly conduct of a direct supervisor that can materially affect the target

¹ The employee's affidavit is attached hereto as an exhibit pursuant to Section 102.69(g)(3), redacted to protect the employee's (affiant's) identity. The unredacted affidavit was produced to the Region, but not attached to the Report.

employees' day-to-day working conditions. Avanzato's statements in support of the Union, such as "wait until the union gets in" and references to "shaking up" the company, along with Avanzato's solicitation of authorization cards, taken together, send a clear message to eligible voters that their now pro-union supervisor believes (a) they should sign the authorization cards, and (b) that they need a union in the facility to shake things up.

At the very least, the Regional Director should have followed the framework set forth in *Harborside Healthcare* and conducted a hearing to determine the effect Avanzato's comments had on the employees in the petitioned for unit and whether there were any "mitigating circumstances" to overcome the "inherent tendency" that Avanzato's card solicitation interfered with employees' freedom to choose whether to sign the authorization card or not.

QUESTIONS PRESENTED

1. Whether the Regional Director erred in failing to give appropriate weight to the Board's decision in *Harborside Healthcare* and the inherent tendency of supervisory solicitation of authorization cards to interfere with an election and instead gave undue weight to other factors. (Exceptions 1-3.)

2. Whether the Regional Director erred in not conducting a hearing on the circumstances surrounding Avanzato's solicitation of authorization cards combined with his pro-union conduct and any mitigating circumstances which would negate the inherent tendency of such solicitation to interfere with the election. (Exceptions 4, 5.)

3. Whether the Regional Director erred in concluding that Avanzato's pro-union comments constitute "permissible expressions of opinion" and did not interfere with the election and not holding a hearing to determine the level of interference. (Exceptions 6, 7.)

4. Whether the Regional Director erred by failing to definitively state that Avanzato, as a Service Training Coordinator is a supervisor under section 2(11) of the Act. (Exception 8.)

ARGUMENT

I. 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 CHOSE TO SIGN A CARD OR NOT

(See Exceptions 1-5)

Regarding supervisory solicitation of cards, the facts are that Avanzato told an employee (the affiant) that the union "will send someone down if you did not sign up yet." Ex. A; Report at 6.² The Regional Director summarily dismissed this evidence as "not sufficient to support a finding that Avanzato directly solicited cards." Report at 7. It is respectfully submitted that the Regional Director's analysis here misinterpreted and limited the Board's holding in *Harborside Healthcare*. (See Exception 1.)

Under *Harborside Healthcare*, Avanzato's solicitation of authorization cards must be viewed, "absent mitigating circumstances," as having "an inherent tendency to interfere with employee's freedom to choose to sign a card or not." *Harborside*, 176 LRRM at 1120. Thus, if there are no mitigating circumstances, the conduct is objectionable per se. The Board in *Harborside* specifically noted the potential for employees to reasonably sense an obligation to support the union after signing a card and the false portrait of union support that supervisor-obtained cards may provide. *Id.* As the Board stated in *SNE Enterprises Inc.*, 348 NLRB No. 69, 180 LRRM 1449 (2006), this is particularly important in a close election. 180 LRRM at 1451. However, the Regional Director did not consider the solicitation under the *Harborside Healthcare* framework. Instead, without any basis in fact or law, he determined that "Avanzato

² The Report acknowledged that even though this solicitation occurred outside the critical period (in June 2009), supervisory solicitation of authorization cards is an exception to the critical period rule established by *Ideal Electric*, 134 NLRB 1275 (1961). Report at 6.

did not directly solicit cards.” Report at 7. This determination allowed the Regional Director to disregard *Harborside Healthcare* altogether and not review whether there were “mitigating circumstances.” (See Exception 4.)

The Board’s decision in *Harborside Healthcare* did not provide the Regional Director with a license to disregard its mandate if the solicitation of authorization cards was not “direct.” The Report states that in *Harborside Healthcare* there “was evidence” that the authorization cards were “directly solicited,” but fails to cite to the *Harborside* decision. Report at 6. In fact, *Harborside* makes no distinction between “direct” solicitation and other solicitation. (See Exception 2.) The Regional Director simply distinguished *Harborside* on its facts. The Report fails to cite a single authority for the proposition that the Board’s mandate in *Harborside* can be disregarded where the authorization cards are not deemed (by the Regional Director) to be “directly solicited.” In fact, in its attempt to limit *Harborside* in this regard, the Report only cites to *Madison Square Garden CT, LLC*, 350 NLRB 117, 182 LRRM 1073 (2007), where the Board specifically overruled the Regional Director’s attempt to limit *Harborside* because the solicitation of cards in that case was made by supervisors with limited authority, was not deemed “pressuring” and ceased 8 weeks prior to the election. Significantly, the Board in *Madison Square Garden* also rejected the Regional Director’s attempt to distinguish between direct and indirect solicitation of cards. The Board held:

While the evidence does not establish that the supervisors actually collected the signed authorization cards from employees, as was the case in *Chinese Daily News*, the initial campaign flyer provided that signed cards could be handed to one of the flyer’s signatories, four of whom were supervisors.

182 LRRM at 1078.

Thus, it was improper for the Regional Director in the case at bar to limit *Harborside Healthcare* to “direct” solicitation of cards, particularly in such a close election. Instead, the Regional Director should have examined whether there were any “mitigating circumstances” which would minimize the “inherent tendency” of supervisory solicitation of authorization cards to destroy employee freedom of choice.³ The Regional Director should also have considered evidence of Avanzato’s pro-union statements made to employees in this context, since it provides further evidence that employee choice to sign an authorization card was not free. (See Exception 5.) Moreover, under the Regional Director’s analysis, a supervisor could avoid taint by simply soliciting an employee to an authorization card but letting the union actually collect the signature at the supervisor’s direction. This is clearly not employee free choice and the Report’s failure to consider such evidence mandates that the Regional Director’s decision summarily dismissing the Objections be reversed.⁴

II. THE REGIONAL DIRECTOR ERRED IN SUMMARILY DISMISSING AVANZATO’S PRO-UNION CONDUCT BECAUSE IT OCCURRED OUTSIDE THE CRITICAL PERIOD AND WAS MERELY OPINION

(See Exceptions 6-7)

Avanzato’s statements in support of Petitioner were summarily rejected by the Regional Director because they occurred “on unspecified dates prior to June 6” and were prior to the

³ The Report notes that there is no indication that Avanzato would know whether the employee in question, or any other employee, had signed an authorization card. Report at 7. This is pure conjecture and not at all discernable from the evidence submitted. In fact, it can be readily concluded that since Avanzato knew that the union would send someone down to sign up the affiant, he would also know whether the affiant signed up. In any event, such facts could have been determined at a hearing, which the Regional Director failed to conduct.

⁴ Instead, the Report improperly emphasizes the fact that Avanzato did not make pro-union statements at the exact same time that he solicited affiant to sign an authorization card, ignoring the other pro-union statements also made by Avanzato to employees and witnessed by the affiant himself. (See Exception 3.) Again, this analysis is contrary to the *Harborside Healthcare* framework.

critical period. Report at 4. However, in *SNE Enterprises, supra*, the Board, following *Harborside*, found objectionable pro-union supervisory conduct where maintenance leads solicited employees, including employees under their direct supervision, even though the supervisors had no hire/fire authority and the conduct ceased one month before the election.

The Regional Director also erred in determining that Avanzato's comments "did not express a preference for unionization." Report at 5. Aside from the fact that there is no basis in the record to make such a presumption, the Regional Director again failed to analyze Avanzato's conduct under the Board's mandate in *Harborside*.⁵ In *Harborside*, the Board set forth a two-part test for assessing objectionable pro-union supervisor conduct: (1) Whether the supervisor's pro-union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election; and (2) whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. The Regional Director merely paid lip service to the Board's standard. Report at 4. The Board has long recognized, "when a supervisor engages in pro-union activity, that "the 'continuing relationship' between the supervisor and an employee 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 Ct LLC*, 182 LRRM 1073 at 1076 (citation omitted). Under these circumstances, it is hard to credit the Regional Director's determination that Avanzato's statements that "this will shake up the company" and "wait until the union gets in" could not be coercive to the employees who hear such statements from their direct supervisor. Moreover, in such a close election, Avanzato's statements in support of the union and his open assistance to their card

⁵ The Report cites to the inapposite decision in *Werthan Packing*, 345 NLRB 343, 345 (2005), a case involving *anti-union* statements made by a supervisor that were deemed to be "lawful opinion."

signing campaign made a free election impossible. Avanzato's pro-union statements should not have been summarily dismissed as "his personal opinion." Report at 5. As the Board in *SNE Enterprises* stated "the first-line supervisor has the most day-to-day contact with the employees ... [and] can impact broadly on subordinates' daily work lives." *Id.* at 1451.

At the very least, the Regional Director should have conducted a hearing into the coercive nature of Avanzato's pro-union comments, particularly in light of the close election result, as *Harborside's* second factor dictates. (Exception 6.)

III. THE REGIONAL DIRECTOR ERRED BY FAILING TO DEFINITELY CONCLUDE THAT THE SERVICE TRAINING COORDINATORS WERE STATUTORY SUPERVISORS AS THE PARTIES HAD STIPULATED

(Exception 8.)

Cintas excepts to the Regional Director's failure to definitively rule that the STCs were statutory supervisors, notwithstanding the detailed submissions made by Cintas to that effect and the stipulation of the parties prior to the election. Petitioner and Cintas entered into a Stipulated Election Agreement whereby the Service Training Coordinators were excluded from the petitioned for unit. In support of its Objections, Cintas also produced overwhelming evidence that the STCs were statutory supervisors, including an affidavit from General Manager Timothy Knoll and documents demonstrating the power of the STCs to hire, schedule, assign, evaluate employees and recommend and issue discipline. (These submissions are attached collectively hereto as an exhibit, pursuant to Section 102.69(g)(3).) Essentially, the undisputed evidence shows that the STCs were the voting employees' day-to-day supervisors. The Regional Director failed to address this evidence in his Report and instead *assumed* that Avanzato, as an STC "possesses sufficient supervisory authority to satisfy the standard announced in Harborside..." (Report at 5.)

For the purpose of analyzing Avanzato's conduct under *Harborside*, it was important that the Regional Director make a conclusion on the supervisory status of STCs and indeed to what extent Avanzato (and the other STCs) affect the daily work lives of the employees he is accused of soliciting. As such, the Regional Director failed to address whether Petitioner even objected to the Employer's classification of STCs as supervisors in response to Cintas' Objections. In any event, "[n]ational labor policy favors the honoring of voluntary agreements reached between employers and labor organizations." *Verizon Information Systems* , 335 NLRB 558, 559 (2001). Indeed, "[t]he Board will enforce such agreements, including agreements that explicitly address matters involving union representation." *Id.*

The significance of the Regional Director's failure to really address the supervisory status goes to the heart of Cintas' Exceptions, because the Board requires an evaluation of the actual supervisory authority under the first factor in *Harborside Healthcare* and the ability of the supervisors in question to affect the employees working environment. *Harborside*, 176 LRRM at 1118; *SNE Enterprises*, 180 LRRM at 1451. In fact, the Regional Director acknowledged and then ignored that the first factor set forth in *Harborside Healthcare* specifically requires the Regional Director to consider the "nature and degree of supervisory authority possessed by those who engage in pro-union conduct." Report at 4. The first factor also requires the Regional Director to conduct "an examination of the nature, extent, and context of the conduct in question." *Id.* The Board should reverse the Regional Director and either make a finding that the STCs were supervisors based on the record evidence, or conduct a hearing on the issue.

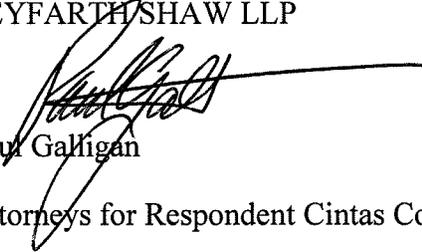
CONCLUSION

Based on the foregoing, and “consistent with the Board’s obligation to carefully scrutinize objections in close elections,” (*SNE Enterprises*, 180 LRRM at 1452) the Report on Objections should be reversed and the Board should either direct that the Region conduct a rerun election, or conduct a hearing on issues not determined by the Regional Director in his Report.

Dated: September 23, 2009

Respectfully submitted,

SEYFARTH SHAW LLP



Paul Galligan

Attorneys for Respondent Cintas Corporation

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a true and correct copy of the *Employer's Brief In Support Of Its Exceptions To Ruling on Objections* to be served upon the following parties by electronic mail and overnight mail this 23rd day of September, 2009:

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

Hope Pordy, Esq.
Spivak Lipton LLP
1700 Broadway, 21st Floor
New York, NY 10019

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



Paul Galligan