UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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AFFILIATED COMPUTER SERVICES, INC.,

Respondent,

- and - 29-RC-11709

COMMUNICATIONS WORKERS OF AMERICA,

Petitioner.

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STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW

The Employer's request for review is based on the fact that it was not given a hearing on the Employer's objections. Here, the Regional Director fully investigated the Employer's objections and issued a determination reflecting that investigation. In order to be afforded a hearing, the Employer must show that its objections raise substantial and material factual issues. NLRB v. Bristol Spring Mfg. Co., 579 F.2d 704, 706-07 (2d Cir. 1978); 29 CFR §102.69(d). Further, a party is only entitled to a hearing if, by prima facie evidence, it demonstrates the existence of "substantial and material factual issues" which, if resolved in its favor, would require the setting aside of the representation election. Id., *citing* NLRB v Newton-New Haven Co., 506 F.2d 1035 (2d Cir. 1974); Polymers, Inc v NLRB, 414 F.2d 999, 1004-1005 (2d Cir. 1969), *cert denied,* 396 U.S. 1010, 90 S.Ct. 570 (1970); NLRB v. Joclin Mfg. Co., 314 F.2d 627, 631-32 (2d Cir.1963). Employer has failed to present evidence sufficient to establish substantial and material factual issues, much less such issues that would require a setting aside of the election. Thus, the Regional Director was correct in the decision not to hold a hearing regarding

the Objections.

Employer has argued that the Regional Director's decision not to order a hearing denied it the right to a full opportunity to submit evidence. To accept this argument would effectively remove the Regional Director's discretion to grant or deny a hearing in accordance with Section 102.69(d) of the Board's Rules and Regulations. Here, the Employer was given more than fair opportunity to present evidence within the constructs of the Rules. Employer's inability to present prima facie evidence to support their Objections without a hearing is not equivalent to an abuse of discretion on the part of the Regional Director. Employer's further suggestion that the Regional Director was mistaken in his interpretation of Board precedent is without justification.

Further, the instant election was not close. The results were: 144 voted in favor of union representation, 126 against and 2 ballots were challenged. (Supplemental Decision on Objections at 2.) The results should not be considered close when compared to those elections the court has deemed so because the margin of the Union's win is greater than the number of challenged votes or 6.5%. Thus, the need for a hearing is not acute.

ARGUMENT

Objection 1

Employer's first objection was that "the Union, by and through its supporters and agents, physically and verbally intimidated, coerced and threatened bargaining unit employees . . ." The Employer provided absolutely no evidence of physical intimidation and only conclusory statements of any other type of conduct. The Employer's evidence did not even tie the complained-of conduct to the Union. Therefore, the Employer provided no reason for the Regional Director to hold a hearing on Objection 1.

The only evidence the Employer submitted to support this Objection was the affidavit of Gerald Dooley. It alleged that a pair of his co-workers intimidated him and attempted to provoke an altercation solely because he was exercising his right to display his sentiments regarding the election. (Employers Attachment 1, pp. 62-64.) The affidavit does not identify the the co-workers or the content of the intimidation. There was no showing that the alleged intimidating comments were made by actual agents of the Union and not by merely pro-union employees.

The Board has held the conduct of employees is generally not attributable to a party and must be evaluated under the Board's standard for third-party conduct. *See* In re Cornell Forge Co., 339 NLRB 733 (2003); Associated Rubber Co., 332 NLRB 1588 (2000). Third party conduct may serve as a basis on which to set aside an election if that conduct is "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).

The Employer's conclusory allegations certainly do not meet this standard. There is no evidence of such an atmosphere. The Regional Director correctly concluded that the mere allegation of intimidation is a general conclusion devoid of any specific content or substance, and fails to satisfy the Board's requirement of reasonable specificity in the filing of objections. *See* Audubon Cabinet Company, 119 NLRB 349, 350-51 (1957).

Objections 4, 5 and 6

Employer's Objections numbered 4, 5, and 6 are based on the circulation of certain documents alleged to be distributed by pro-union employees and/or representatives of the union during the critical period. These documents contain letters from elected officials which discuss the new "Activity Based Compensation" pay plan proposed by ACS, and express concerns about

the relations between ACS and its employees. Attached to some of the letters was a Union campaign flyer. In support of all three objections, Employer relies upon: (i) the content of the elected officials' letters; (ii) the fact that a pro-union flyer was attached to the back of some of the letters; (iii) the affidavits of four employees; and (iv) the affidavit of Employer's Vice President. Other than Employer's attenuated arguments and conclusory statements, there is not enough evidence to establish a prime facie case that the letters did anything more than give information and express general concern for the well being of the employees. Regardless of the author and distributor of the documents, their dissemination to employees is not an act that would require setting aside of the election.

Assuming the content of the materials to which Employer objects had an effect which rendered improbable a free choice in the election, this standard is inapplicable without a showing of an agency relationship between the elected officials and the Union, Union authorship of the letters purportedly from the elected officials; or Union distribution of the letters. The authenticity of the letters is not in question, therefore there is no evidence of union authorship. Employer has failed to identify any of the individuals that distributed the materials, and there is no proof that the distribution was by actual agents of the Union and not by merely pro-union employees. The Board has held that the conduct of employees is generally not attributable to a party and must be evaluated under the Board's standard for third-party conduct. *See* In re Cornell Forge Co., 339 NLRB 733 (2003); Associated Rubber Co., 332 NLRB 1588 (2000).

Employer's argument to establish agency is based solely on a similarity in language at the end of two letters, written by two different politicians. This argument is without merit. Even if there was collusion between the politicians, that does not establish and collusion with the union.

Therefore, this evidence does nothing to support a claim of agency between the elected officials and the Union.

Employer has failed to present evidence to establish a substantial factual issue regarding Union authorship or distribution of the materials, and has failed to establish an agency relationship between the elected officials and the Union. The standard that the materials should be viewed under is third-party conduct, which conduct is "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). There is no evidence of such an atmosphere. Therefore, the Regional Director was correct in his conclusions on these objections.

Assuming the Regional Director was incorrect in applying the Westwood standard, the objections would still fail under the General Shoe standard: an atmosphere calculated to prevent free and untrammeled choice by the employees. 77 NLRB 124, 126 (1948). Set forth below are the reasons objections 4, 5, and 6 fail under the General Shoe standard.

In Objection 4, Employer argues that the letters from the politicians misled the employees into believing that the government encouraged employees to vote for the Union. There is no explicit support of the Union in the election any of the letters. An interpretation of these letters as government support is attenuated at best. In the alternative, and as stated by the Regional Director, the letters can easily be construed as campaign propaganda, which will not serve as a grounds for setting aside the election. Midland National Life Insurance Co., 263 NLRB 127, 130 (1982).

Employer argues that an interpretation by a fraction of the employees, distinct from the Regional Director, requires a hearing. The requirement of a hearing in this situation extremely limits the discretion given to the Regional Director by the Board. The Regional Director has the

discretion to interpret the content of the letters, and the evidence presented is not substantial to negate his interpretation.

In Objection 5, Employer argues that the letters were coercive in that they suggest the elected officials not only have the ability to affect the flow of public funds for projects favorable to ACS, but also that the outcome of the election would influence the way they choose to divert the funds. This is quite the charge to make based on content merely describing the ABC pay system. The notion that the politicians were so interested in the outcome of this Representative Election they would act unethically in their duties as Public Officials is bordering on the absurd. There is no evidence that the elected officials even purported to have the ability to control public projects favorable to employees, and certainly not that they would be willing to unethically divert those funds. The Regional Director correctly refused this argument.

In Objection 6, Employer argues that the politicians threaten layoffs will ensue if the "activity based compensation" system is implemented. This Objection falls to the same problem as did Objection 5. It is hard to believe that an employee would think a politician has the ability to layoff employees in a private business. Even if a politician had that ability, there is no evidence that those in question actually threatened to do so. As with Objection 5, the Regional Director must have the discretion to deny such an argument, and was correct in doing so.

Objection 8

Employer alleges that on the eve of the representation election, an employee was contacted by a union representative that misrepresented the impact of the employee's particular vote. It is alleged that the union representative stated that the employee's vote was inconsequential because all ballots were to be impounded. Assuming this allegation is true, the Board has specifically

found that misrepresentations about the impact of an employee's particular vote are not objectionable. *See* Community Hospital Inc of East St. Louis, 251 NLRB 1080 (1980); County Line Cheese Co., 265 NLRB 1519 (1982). The Regional Director's decision was based firmly in Board precedent and was correct.

Objections 9, 10 and 11

Objections 9, 10 and 11 challenge the election process itself. Employer has no specific facts supporting its allegation of a flaw in the election process, but rather attempts to create a suspicious set of circumstances. Such is not sufficient to support an objection. Allen Tyler & Son, Inc 234 NLRB 212 (1978).

An independent investigation revealed that Regional personnel closely followed the procedures set out in the Casehandling Manual. Employer argues that a failure to strictly follow the election procedures should require the election to be set aside. However, the Board has upheld elections where the election procedures were not strictly followed but in which there was no reason to doubt the validity of the elections themselves. *See* Sawyer Lumber, LLC, 326 NLRB 1331 (1998); Queen Kapiolani Hotel, 316 NLRB 655 (1995); Polymers, 170 NLRB 333 (1968). Employer has not established that there is any reasonable doubt as to the fairness or validity of this election. There is no evidence that the Region deviated from the election procedures or that the impounded ballot envelopes had been opened or disturbed at any tine outside of the parties' presence. Employer has failed to present any evidence that creates a substantial issue of fact as to a flaw in the election process. The Regional Director's Decisions should be upheld.

CONCLUSION

For all of the reasons set forth above and set forth in the Regional Director's Supplemental Decision on Objections, the Communications Workers of America respectfully requests that the Employer's Request for Review be denied. Further, since the Employer provided absolutely no basis for its request for a stay of the certification of CWA as the collective bargaining representative of the Employer's employees, CWA respectfully requests that the certification not be stayed.

Dated: New York, New York
August 27, 2009

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Certificate of Service

I hereby certify that on this 27th day of August 2009, a true and correct copy of the foregoing Statement in Opposition to Employer's Request for Review has been sent by email to the following:

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