

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

NATIONAL VISION, INC. D/B/A AMERICA'S BEST
CONTACTS & EYEGLASSES

Employer

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 653

Petitioner

Case 18-RC-065382

**REPORT AND RECOMMENDATION ON OBJECTIONS AND
RECOMMENDATION THAT CERTIFICATION OF REPRESENTATIVE ISSUE**

Pursuant to a petition filed on September 26, 2011 and a Stipulated Election Agreement approved by me on October 7, an election by secret ballot was conducted on November 4, 2011 among certain employees of the Employer.¹ The results of the election are set forth in the Tally of Ballots issued on March 4.² The challenged ballot is not sufficient in number to affect the outcome of the election.

¹ The appropriate collective bargaining unit agreed to by the parties and approved by me is defined as:

All full-time and regular part-time nonprofessional employees employed by the Employer at its Burnsville, Minnesota store; excluding managerial employees and professional employees, guards and supervisors as defined in the Act.

² The Tally of Ballots reveals:

Approximate number of eligible voters	6
Number of void ballots.....	0
Number of votes cast for Petitioner	5
Number of votes cast against participating labor organization(s)	1
Number of valid votes counted.....	6
Number of challenged ballots.....	1
Number of valid votes counted plus challenged ballots	7

Subsequently, the Employer filed timely objections to conduct affecting the results of the election, which were received in the offices of Region 18 on November 10, 2011, and which were served on Petitioner. A copy of the objections is attached as Exhibit 1.³

Pursuant to Section 102.69 of the Board's Rules and Regulations, I have caused issues raised by the objections to be fully and carefully investigated and hereby issue this Report.

The Employer's Operation and the Stipulated Unit

The Employer is a Georgia corporation engaged in the retail sale of optical products and eye exams. It has 312 stores located in 43 states. Ten of the 312 stores are located in Minnesota. One of the Minnesota retail outlets is located in Burnsville, Minnesota, which is the location involved in this dispute. The Employer's Senior Vice President of Operations supervises the day-to-day operations of the 312 stores. One of the individuals reporting to the Senior Vice President of Operations is a Regional Vice President for the Central South Group, who is responsible for about 96 stores, including the 10 stores in Minnesota.

The Employer's Burnsville operation is the responsibility of a general manager. Reporting to the general manager is an eyeglass assistant manager. It is the assistant manager's alleged pro-union conduct which is the subject of the Employer's objections. While most of the Employer's retail stores also have an assistant manager for contacts, it appears that the Burnsville store did not have this position filled during most (if not all) of the time in dispute.

³ I have redacted the name of the Employer's assistant manager, whose conduct is in dispute in this matter, from the attached copy of the objections.

The unit stipulated as appropriate by the Employer and Petitioner is a unit of nonprofessional employees involved in the retail sale of products. Unit employees perform receptionist duties, sell product, and make sure optical products are correct when after they are returned from the lab. According to the *Excelsior* list provided by the Employer, at the time of the election there were six employees in the unit.

The Employer's Objections

The Employer lists four objections to the election, all related to the conduct of its assistant manager for eyeglasses. Objection 1 claims that the assistant manager solicited employees to sign Union authorization cards; Objection 2 claims that the assistant manager had individual meetings with employees to pressure them to vote for the Union; Objection 3 claims that the assistant manager pressured employees to vote for the Union during a staff meeting; and finally Objection 4 is a general statement that the assistant manager improperly coerced and interfered with employees' exercise of their Section 7 rights.

Pursuant to the Board's Rules (Section 102.69(c)(1)), the Region conducted an investigation of the Employer's evidence in support of its objections by taking affidavits from all witnesses identified by the Employer as supporting the objections. These witnesses include two high-level managers and an employee of the Employer whose name is on the *Excelsior* list.

The Employer provided no evidence in support of the first two numbered objections. Therefore, there is no evidence that the assistant manager for eyeglasses solicited employees to sign authorization cards or held individual meetings with employees to pressure them to vote for the Union. On the contrary, the single unit employee to testify – allegedly in support of the Employer's objections – stated that an

employee whose name appears on the *Excelsior* list, and not the assistant manager, gave the employee an authorization card to sign. According to the employee, “(The assistant manager) never talked to me and urged or recommended that I sign the Union card ... (The assistant manager) never came up to me and encouraged me to support the Union or encourage me to vote yes.” On the contrary, the employee describes in detail efforts by employees named on the *Excelsior* list to contact the employee and gain the employee’s support for the Union. Moreover, according to the employee, “I never had a one-on-one meeting with (the assistant manager).” The employee also testified that it is the employee’s belief that most of the employees got authorization cards at a Union meeting, and that none of the employee’s co-workers ever told the employee that the assistant manager gave them a card or met with individual employees.

On the other hand, the Employer provided evidence that the assistant manager openly supported the Union. For purposes of considering whether the assistant manager’s support for the Union constitutes objectionable conduct, I assume *arguendo* that the assistant manager of eyeglasses is a statutory supervisor.⁴

The Employer’s evidence points to two instances when the assistant manager demonstrated support for the Union. The first occurred on November 1, 2011 when the Senior Vice President of Operations met with the assistant manager. The purpose of the meeting was to discuss how it came about that employees at the Burnsville operation desired Union representation. During the course of the meeting according to

⁴ The evidence regarding the supervisory status of the assistant manager of eyeglasses is in conflict, and it is by no means clear that the position meets the definition of a supervisor within the meaning of the Act. However, I find it unnecessary to resolve this issue as I conclude that the assistant manager’s pro-union conduct did not interfere with employee free choice and did not materially affect the outcome of the election. See, *Northeast Iowa Telephone Co.*, 346 NLRB 465, 466 (2006).

the Senior Vice President, the assistant manager responded to questions in a way that made clear the assistant manager fully supported the Union effort, largely because of dissatisfaction with lack of response from higher ups and with the lack of training. In addition, the assistant manager expressed dissatisfaction with not being promoted to the general manager position. According to the Senior Vice President, the assistant manager "said the issues were real issues and (the assistant manager) agreed with the need for a Union and (the assistant manager) fully supported what they were doing." This meeting lasted about 45 minutes. As a result of the meeting, the Senior Vice President concluded that the assistant manager was "knee deep in this stuff" and reported this conclusion to the Employer's general counsel. However, the Senior Vice President acknowledges that the meeting with the assistant manager was a one-on-one meeting. There is no evidence any agreed upon unit employee participated in or heard this conversation.

The second incident occurred on November 2. Both the Senior Vice President for Operations and the Regional Vice President for the Central South Group described this incident. It occurred during a two-hour meeting with unit employees held by management. According to the Senior Vice President of Operations, "On November 2 we brought in consultants to talk to the employees about the Union. We shut the store down early and brought in lunch for everyone. I was present for the presentation." This is the first time that the Senior Vice President for Operations had been to the Burnsville store.

At the November 2 meeting, the consultants presented slides opposing union representation. For example, according to the Senior Vice President of Operations, one slide stated that if an agreement could not be reached there could be a strike. Another

slide showed the salaries of Union representatives, and the consultant remarked as you can see the Union is not spending any money on Union members “for entertainment.” Whenever a slide was presented that the assistant manager or another employee whose name is on the *Excelsior* list disagreed with (including the two described herein), one or both of them challenged the slide. For example, when the consultant presented the slide on salaries, the assistant manager stated, “We know that is not true.” Then, according to the Senior Vice President, an employee (identified by name) challenged the Employer further and questioned how much the CEO made “off our backs.” At this point the Senior Vice President interjected that what the CEO makes is of no concern to employees. Also covered at the meeting was the failure of the Employer’s training program. The Senior Vice President placed the blame on the assistant manager, which caused a verbal retort from the assistant manager. According to the Senior Vice President, “At that point, I noticed that the employees shifted their chairs away from (the assistant manager) and (the employee outspoken in support of the Union).” At the end of the meeting, the Senior Vice President asked that employees give them time to correct the issues as they were not things that could be corrected within 30 or 60 days, and asked that if employee chose to vote, that they vote no. An employee (not the assistant manager) responded that “we need the help and we needed (sic) someone to support us.”

The Employer’s Submission Fails to Present Evidence that Raises Substantial and Material Factual Issues

It is the obligation of the party filing objections to come forward with evidence that establishes a prima facie case in support of its objections. Absent such evidence, no hearing on objections need be held. See *Sec. 102.69(d), Board’s Rules and*

Regulations. As the Seventh Circuit Court of Appeals explained in *NLRB v. Indiana Home Sanitation*, 803 F.2d 345, at 350, enfg. 275 NLRB No. 199 (1985) (not reported in Board volume):

(T)he company did not come forward with evidence that established a prima facie case for setting aside the election. Moreover, it failed to raise substantial and material factual issues requiring a hearing since the Regional Director accepted as true all the evidence it offered, even controverted evidence. The company's only assertion was that a hearing should have been held in order to determine whether the conduct it complained of had an impact on the election. Its failure was that it could not offer any evidence that indicated such an impact was likely.

In the instant case, the Employer has failed to come forward with evidence that establishes a prima facie case for setting aside the election. In this regard, I accept as true the affidavit testimony of the witnesses provided by the Employer. That testimony proves that the assistant manager clearly expressed support for the Union and for employees' efforts to organize at a meeting with an upper-level manager where no employees were present, which is clearly not objectionable conduct because the test is whether the evidence establishes conduct interfering with employees' free choice. That there is internal disagreement among supervisors/managers regarding the wisdom of employees seeking Union representation is irrelevant.

However, there is testimony that proves that the assistant manager clearly expressed opposition to certain representations made by the Employer's consultants at a meeting where the Employer was trying to convince employees to vote against the Union. This pro-union conduct differs markedly from that in *Harborside Healthcare, Inc.* 343 NLRB 906 (2004) cited by the Employer. In *Harborside* the supervisor in question repeatedly told employees that they could

lose their jobs if the union lost the election, initiated loud and intimidating confrontations with employees to cajole them to support the union, and engaged groups of employees in discussions during which the supervisor made repeated reference to the lack of job security. The supervisor told employees that she was counting on them voting for the union, pressured an employee to wear a union pin, solicited authorization cards and signatures on a union petition, and required at least one employee to attend union meetings.

None of the conduct described in *Harborside* occurred in the instant matter. There is no evidence of threats, no evidence that the assistant manager solicited authorization cards, and not even evidence that the assistant manager urged employees to support the Union at any time outside of the context of the November 2 meeting. Rather, the assistant manager's sole conduct was to contradict and argue against the Employer's position during a meeting of employees where the Employer made an anti-Union presentation. The assistant manager's pro-union conduct did not reasonably tend to coerce or interfere with employee free choice.

In addition, the assistant manager's conduct did not materially affect the outcome of the election. First, the vote itself is overwhelming in favor of Union representation. Second, the assistant manager's conduct is isolated to one meeting – a meeting where the Employer's own Senior Vice President of Operations (who had never been to the Burnsville facility before) contradicted the assistant manager's views and blamed the assistant manager for any flaws in the training program. Thus, while the assistant manager clearly made pro-union statements, it is also clear that employees would not attribute them to the

Employer. In fact, the Senior Vice President observed employee conduct which suggested to her that unit employees made an effort to disassociate themselves from the comments of both the assistant manager and a pro-Union employee. Thus, even if the assistant manager's pro-Union conduct were objectionable, it did not materially affect the outcome of the election.⁵

CONCLUSION AND RECOMMENDATION

In conclusion, I find that Employer has failed to show by prima facie evidence the existence of substantial and material factual disputes which, if resolved in Employer's favor, would require the setting aside of the election. See *NLRB v. Whitney Museum of American Art*, 636 F.2d 19, 105 LRRM 3239 (1980) (the right to a hearing arises only when a party shows by prima facie evidence the existence of substantial and material factual disputes which, if resolved in its favor, would require the setting aside of the election).

Based on the foregoing, and as a majority of valid voters were cast for representation, I recommend that a Certification of Representative issue.

Right to File Exceptions

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the

⁵ The Employer cites additional cases, all predating *Harborside* by 20 years or more, for the proposition that objectionable conduct occurs where a supervisor's activity implies to employees that their employer favors a union, or where a supervisor's conduct causes employees to sign authorization cards and/or vote for a union because of fear of supervisory retaliation. However, as noted herein, there could be no mistake among employees that the Employer opposed the Union organizing effort, and there is no evidence that the assistant manager solicited employees to sign authorization cards or threatened employees in any way if they failed to support the Union.

Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **December 21, 2011**, at 5 p.m. (Eastern Time), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. *Once the website is accessed, click on **File***

Case Documents, enter the NLRB Case Number, and follow the detailed instructions.

The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Minneapolis, Minnesota, this 7th day of December, 2011.

/s/ Marlin O. Osthus

Marlin O. Osthus, Regional Director
National Labor Relations Board
Eighteenth Region
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Attachment

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

AMERICA'S BEST CONTACTS AND EYEGLASSES, :
 :
Employer, :
 :
and : Case 18-RC-065382
 :
UNITED FOOD AND COMMERCIAL WORKERS :
UNITED LOCAL 653, :
 :
Petitioner. :

OBJECTIONS TO ELECTION

Pursuant to Section 102.69(a) of the Rules and Regulations of the National Labor Relations Board, America's Best Contacts and Eyeglasses ("Employer") hereby objects to the conduct of United Food and Commercial Workers United Local 653 ("Union") and (name of assistant manager) that interfered with, and affected the outcome of, the election held on November 4, 2011, for the following reasons:

Objection Number 1

(Name of assistant manager) serves as a supervisor for the Employer as defined by Section 2(11) of the Act. (Name of assistant manager) pro-Union conduct reasonably tended to coerce or interfere with the (name of assistant manager) employees' exercise of free choice in the election. Specifically, (name of assistant manager) solicited employees to sign Union authorization cards.

Objection Number 2

Prior to and following the filing of the Representation Petition, (name of assistant manager) conducted individual meetings with employees to pressure them to vote for the Union.

Objection Number 3

Following the filing of the Representation Petition and close to the date of the election, (name of assistant manager) pressured employees to vote for the Union during a staff meeting.

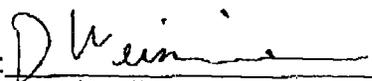
Objection Number 4

The Union was aware of (name of assistant manager) status as a statutory supervisor and continued to (name of assistant manager) encourage and support (name of assistant manager) improper coercion and interference with the employees' exercise of their Section 7 rights.

The Employer respectfully submits that the foregoing conduct interfered with the employees' free and unfettered choice in determining whether to select a collective bargaining representative and materially affected the outcome of the election. The Employer objects to these and other acts of the Union and (name of assistant manager) and, as a remedy, requests that the Regional Director review and investigate the aforementioned conduct and set aside the results of the election or, in the alternative, order a hearing on this matter.

Dated: November 10, 2011

Respectfully submitted,

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