

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TARGET CORPORATION,

Respondent,

and

UNITED FOOD & COMMERCIAL  
WORKERS LOCAL 1500

Charging Party.

Case No: 29-CA-30804  
29-CA-30820  
29-CA-30880  
29-RC-12058

JD(NY) 16-12

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**REPLY TO THE UNION'S ANSWERING BRIEF OF TARGET CORPORATION'S  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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On the Brief:

Alan I. Model, Esq.

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## **I. THE ALJ'S FINDING THAT TARGET'S HANDBOOK CONTAINED OVERBROAD POLICIES WAS ERROR**

### **A. The ALJ Did Not Apply The Appropriate Standard**

The Union contends that the ALJ “followed the *Lutheran Heritage's* objective test” by stating the obvious that the ALJ “evaluated the language of each of the rules at issue and found that a reasonable employee would interpret the language to prohibit Section 7 activities.” (U. Br. 3). This blanket assertion does not replace the ALJ's failure to analyze the record evidence as part of the objective standard, as he was required to do.

Moreover, the Union supports the propriety of the ALJ's objective test with misstatements. For example, the Union claims that the “Handbook was in effect and widely distributed.” (U. Br. 3). The record, however, shows that at least 42% of the 273 eligible voters *did not* receive the 2009 Handbook. (R. Br. 32; R. Ex. 41). Thus, this undercuts any suggestion that the handbook was “widely distributed” because the evidence proves otherwise.

The Union regurgitates the same case law as the ALJ, but misses the mark. The Union disingenuously tries to bolster the ALJ's reliance on *Cintas* by claiming that, as in the instant case, “there was evidence that employees [in *Cintas*] disregarded the rules” at issue. (U. Br. 3). There is nothing in the *Cintas* decision to suggest that any employee in that case acted in direct contravention of the rules at issue. Indeed, the Union cites to page 946 of the *Cintas* decision, which merely references information distributed by the union, not by employees.

### **B. The ALJ Erred In Rejecting Target's Defenses To The Handbook Violations**

The Union contends that the 2009 Handbook was “widely distributed” and tries to get around the record evidence by claiming such does not exist. (U. Br. 5 and fn. 6). Respondent Exhibit 41, admitted into evidence under Fed. R. Evid. 1006, clearly proves that 123 of the 273 employees (45%) eligible to vote in the June 17, 2011 election did not receive the 2009

Handbook. Only 137 of the 273 employees (50%) actually received the 2009 Handbook. The record does not contain evidence that the remaining 13 employees received the 2009 Handbook. Thus, at best, the record shows that 50% of employees had received the 2009 Handbook. The Union failed to amend the record (even upon suggestion of the ALJ at Tr. 994) to dispute this evidence and is now foreclosed from trying to change the evidence. (U. Br. 5, fn. 6).

Similarly, the Union's attempt to rescue the lack of record evidence of dissemination of the 2009 Handbook by referencing orientation sessions and "huddles" fails. (U. Br. 5-6). As to the orientations, R. 41 proves that 45% of the eligible voters never attended the orientation at which the 2009 Handbook was disseminated. As to the huddles, there is no record evidence that the 2009 Handbook policies at issue were discussed in such huddles.

The Union's claims that the rules were enforced are weak, at best. Contrary to the Union's assertion that "employees were told (at "huddles," "chat sessions," etc.) whenever a new edition of the Handbook had been released . . . ." such evidence is irrelevant as the testimony was about post-election issuance of the 2011 Handbook. (U. Br. 6). The Union further attempts to show the rules were enforced by claiming that Store Manager Pena "had worked at Valley Stream for several years," and thus, the store was not under "poor management." (U. Br. 6, fn. 7). The truth (and record evidence) is that the Valley Stream store was "operationally broken" and Pena came to Valley Stream in the fall of 2010, a few months before the Union's organizing in early 2011. Moreover, the record is clear that in February 2011, a new Human Resources Manager was brought into the store and inherited a "very disheveled, disoriented" Human Resources department where Target's policies were not being followed. (Tr. 774, 832, 962).

To further bolster the ALJ's erroneous findings, the Union makes the unfounded assertion that "Respondent wildly distorts the record as to alleged employee contravention of the

rules.” (U. Br. 7). It is the Union, however, that is wildly distorting the record as to the alleged lack of employee contravention of the rules. In fact, the record evidence is that many employee witnesses testified that each of the rules under attack was openly and repeatedly ignored by Valley Stream employees. (Examples of record evidence include: as to Information Security, *see* Tr. 361, 362-362, 784-785, 804-805, 883-884, 921-922, 938; as to solicitation and distribution, *see* Tr. 21-23, 109, 112-114, 123, 130-131, 142, 154, 634, 670-680, 872-874; as to the After Hours policy, *see* Tr. 148-149, 193, 328, 331, 358, 371, 463-464, 594, 735, 780-781, 868-870, 912, 950-951, 966-967, 970; as to the Dress Code policy, *see* Tr. 140-141, 192, 378, 592-593, 686, 733-735, 783-784, 867, 909-910, 933-934, 952, 964-966, 969). Even the ALJ readily acknowledged in his opinion that employees flouted the rules and that Target did not enforce or remind employees of rules during the campaign.

The Union then makes the incredulous argument that activities in violation of these rules by pro-union employees “cannot be used to impute the same knowledge on 265 additional employees.” (U. Br. 8). The reality is that the Union’s employee witnesses were prime examples of Valley Stream employees who acted in direct contravention of the rules at issue and now the Union is trying to negate such damaging evidence.

### **C. The Solicitation And Distribution Rules Are Lawful**

For the reasons set forth in the Company’s Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 18-23). To lend support to the ALJ’s findings, the Union cites to a handful of isolated examples of testimony pertaining to alleged enforcement of the solicitation and distribution policy. As set forth in the Company’s Exceptions, the ALJ erred in his related findings. *See* R. Br. 42-44. Even if factual, which is not the case, these incidents were isolated and pertained to a handful of openly pro-Union employees out of the 273 eligible voters, and did not at all impede the repeated solicitation and distribution

of the employees which occurred thereafter. To embellish the alleged enforcement of the solicitation and distribution policy, the Union resorts to hearsay. Specifically, the Union improperly proffers that “other Target employees who did not testify at the hearing attended a meeting . . . where they expressed fears that they would face personal retribution and the store would close if management observed them engaging in protected Section 7 solicitation and distribution activity.” (U. Br. 13). Moreover, the Union’s assertion that “*Register-Guard* has nothing to do with the issue here . . .” is wrong and further illustrates the need for the Board to clarify its precedent. (*See* U. Br. 14; R. Br. 20-22).

**D. The Information Security Rule Is Lawful**

For the reasons set forth in the Company’s Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 14-18). The Union attempts to refute that “[E]mployees are permitted to, encouraged to and openly speak about their wages, benefits and other terms and conditions while at work.” To do so, it disingenuously claims that “none of Respondent’s transcript cites remotely support this proposition.” (U. Br. 17). A read of the record proves that all of the transcript citations provided in the Company’s brief (Tr. 361-363, 784-785, 804-805, 921-922, 938) pertain to employees discussing their wages, benefits and other terms and conditions while at work. The Union’s arguments to the contrary are flat out wrong.

**E. The After Hours Policy Is Lawful**

For the reasons set forth in the Company’s Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 23-27). The Union’s Answering Brief rightly acknowledges the ALJ’s error in failing to read the After Hours paragraph in conjunction with the Visitors paragraph. (U. Br. 18; see R. Br. 25-26). Then, the Union missteps by claiming “[t]here is no support whatsoever anywhere in the record for this claim” that “large numbers of Target employees not only visited non-public areas of the Valley Stream store while off-duty but

routinely socialized with one another in the break room, parking lot, and other areas for extended periods of time.” (U. Br. 19). In truth, the record shows that employees do return to the Valley Stream store when off-duty to watch TV in the break room, attend “Fast, Fun & Friendly” events, bring food to friends, sing Karaoke and relax in the break room. (Tr. 148-149, 193, 358, 463-464, 580, 781. 869-870, 950, 970, 996-997). Bringing food to co-workers, watching TV, singing Karaoke and relaxing is socializing, despite the Union’s contrary claim. (U. Br. 20).

**F. The Dress Code Policy Is Lawful**

For the reasons set forth in the Company’s Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 29-31). In light of the evidence that the dress code was not enforced and employees acted in direct contravention of it, the Union claims that “Respondent misleadingly suggests that large numbers of Target Valley Stream employees wore union paraphernalia on store property throughout the entire election period without being subject to discipline. R. Br. 5, 29-31. Yet, the record provides no evidence of this claim.” (U. Br. 21). There is no such misleading as the Union claims; rather, the record is clear that Valley Stream employees wore union paraphernalia in the store. One example, which the Union conveniently forgets, is Odane Murray who wore his Union t-shirt to work. (Tr. 593, 735, 966-968).

The Union tries to buttress its position with two faulty assertions. First, the Union claims that pro-Union employee Green “was told to wear only red and khaki during work hours, which she understood to mean no Union paraphernalia.” (U. Br. 22). This is a flagrant attempt to mislead the Board as Green *admitted* that she was told such by an employee (a/k/a Team Member), not by a manager.

Q. Did you believe that you could wear Union insignia at work when you were working there?

Q. And why not?

A. Because I have been told that we cannot wear anything except for red and khaki.

- Q. And when were you told that?  
A. It was during the whole election process.  
Q. Were you told that at any other time?  
A. No.  
Q. And who told you?  
A. It was a person working in HR.  
Q. Do you remember that person's name?  
A. No.  
Q. Was the person a manager or a team member?  
A. Team member.  
Q. Did any manager ever tell you that?  
A. No.

(Tr. 95). Second, the Union's citation to testimony of Union organizer Waddy that employees were afraid to wear Union paraphernalia is hearsay.

#### **G. The Parking Lot Policy Is Lawful**

For the reasons set forth in the Company's Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 27-29). The Union asks the Board to parse out the word "loitering" and ignore the rest of the verbiage and the record evidence. Doing so is against Board precedent. The Union also claims that the safety incidents in the parking lot were "attenuated in time." (U. Br. 24). The fact is that the safety issues were current and ongoing during the Union's campaign. One example is the fire in Target's dumpsters in April 2011. ETL of Asset Protection testified as to the car break-ins and other safety issues during his tenure, which commenced in December 2010. (Tr. 635-637).

#### **II. TARGET DID NOT THREATEN STORE CLOSURE**

For the reasons set forth in the Company's Brief in Support of Exceptions, the ALJ erred in finding that this leaflet violated the Act. (R. Br. 34-37). In response to the Company's Exceptions, the Union points to decisions with egregious fact patterns and tries to liken them to the instant situation. *Bryant & Cooper*, 304 NLRB 750 (1991), is not analogous as the letter in that case specifically stated that the union contributed to the closing of restaurants, a closing is

*inevitable* and “[w]e don’t want that to happen here. You have an opportunity to prevent it.” Nowhere in the leaflet did Target imply that Target may close the Valley Stream store or that it even might occur if the Union were certified.

What’s more, the Union selectively quotes the leaflet at issue to avoid the statement that the Union “could help economically” by negotiating wage and benefit cuts. (U. Br. 26). The reason for doing so is obvious – the leaflet informed Target’s employees that a union could help the economic situation, which cuts against the alleged threat of store closure.

### **III. THE ALJ’S DIRECTION OF A SECOND ELECTION WAS ERROR**

The Union claims that the ALJ correctly directed a second election by arguing, without citing to any factual evidence, that: (1) the number of violations was numerous; (2) the conduct was severe; and (3) the mere maintenance of overbroad work rules is sufficient, without more, to set aside an election. In doing so, the Union grossly overstates the evidence that formed the basis for the ALJ’s decision and completely ignores undisputed evidence that the rules were *never* enforced, employees flouted those rules without consequence and employees openly and actively campaigned on behalf of the Union. However, that is precisely the type of evidence that the ALJ was *required* to consider in determining whether the Union presented the specific evidence necessary to meet its heavy burden of setting aside the election.

By no stretch of the imagination can the conduct in the instant case be considered numerous or severe. The only way to reach this conclusion is for the Union to claim that the ALJ relied on more than the existence of the overbroad work rules when setting aside the election. However, the ALJ’s discussion of the objectionable conduct and his erroneous decision to set aside the election were based *solely* on the work rules. The Union simply cannot now speculate that the ALJ considered anything other than the Handbook violations. In fact, a careful review of the ALJ’s decision demonstrates that while the Union may have argued in its post-

hearing brief that the allegations of unlawful store closure and interrogations also supported setting aside the election, *the ALJ did not even consider these allegations in his opinion*. Thus, the Union cannot infer that the ALJ considered these allegations when he set aside the election and the Union's speculation that he must have done so would be to rewrite the ALJ's decision.

Because the ALJ's decision to set aside the election was based solely on the work rules, the Union's argument that allegations were "numerous" or that Target's handbook policies demonstrated "severe" conduct cannot withstand scrutiny. Severe conduct might have existed if the Union had been able to convince the Regional Director that Target had (1) disciplined or terminated union supporters (which never occurred), (2) actually enforced the overbroad work rules by, for example, directing employees to remove union insignia (in fact, employees wore pro-Union insignia) or ordering them to cease any discussion about wages and working conditions (in reality, employees admittedly and openly discussed their terms and conditions of employment), (3) repeatedly interrogated employees about their union sympathies (which never occurred), or (4) actually told employees that it *will* close the store if the Union were certified (which also never occurred). There is nothing in the record to suggest that anything like these events occurred and, therefore, the Union cannot credibly argue that the election should have been set aside because it subjectively believes the Handbook violations are numerous or severe.

The Union also failed to present any evidence to show how any of the allegations, even if true, interfered with employee free choice to such a degree that it impacted the results of the election, and its reliance solely on *Jurys Boston* is misplaced. Indeed, as the Board explained in *Delta Brands*, the mere maintenance of overbroad handbook policies in *some circumstances* may be sufficient to overturn an election. It is not a *per se* rule and when faced with undisputed evidence that, during the campaign, the Handbook provisions were never enforced, were not

communicated to all employees and were completely ignored by employees, the Union had to present additional evidence to show that, in fact, the existence of the policies had an impact on free choice in the election. It did not do so. Instead, it lost the June 17 election by a wide margin and speculates that it must have been because of a Handbook that half of the employees *never* saw or received or that employees generally ignored.

The Union also ignored the critical differences between the instant case and the facts presented in *Jurys Boston*. Specifically:

- *Jurys Boston* is limited to representation cases and, therefore, has no application to consolidated cases;
- *Jurys Boston* was decided by a single vote, whereas the Union in this case lost by a significant margin; and
- Target’s employees regularly ignored all of the policies that the ALJ found to be unlawful and neither the Union nor the ALJ cited evidence to suggest that *any* Target employee was chilled by these rules (unlike *Jurys Boston* where the evidence was that adhered to and were chilled by the existence of the policies).

The Board in *Jurys Boston* set aside the election because “one of the rules actually chilled employees” and “a single vote decided the election.” That is not what occurred here. Target employees actively and openly engaged in solicitation and distribution; wore pro-Union insignia at work; accessed Target’s premises, including the parking lot; and openly and actively discussed their wages and other terms and conditions of employment. It defies logic for the ALJ and the Union to argue that under these facts, the work rules had an impact on the election. There is no evidence to support this conclusion and it was error for the ALJ to conclude otherwise.

Finally, contrary to the Union’s arguments, the wide margin in victory militates against

setting aside the election, especially when faced with the undisputed fact that employees regularly and repeatedly ignored the Handbook provisions at issue during the entire campaign. This is not a situation where a single vote could have resulted in a victory for the Union. To ignore the wide margin in this case is to ignore employee choice altogether.

#### **IV. CONCLUSION**

The Board should set aside the ALJ's Decision and certify the June 17 election results.

Respectfully submitted,

/s/ Alan I. Model

Alan I. Model

Attorney for Target Corporation

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