

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9**

**CONAGRA FOODS, INC.**

**Cases 9-CA-089532  
9-CA-090873**

**and**

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 75**

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**CONAGRA FOODS, INC.’S  
REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Respondent, ConAgra Foods, Inc. (hereinafter “ConAgra” or the “Company”), for its Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge in the above-captioned matter states as follows:

**I. INTRODUCTION**

This matter is before the National Labor Relations Board (hereinafter the “Board”) upon ConAgra’s exceptions to Administrative Law Judge Arthur J. Amchan’s (hereinafter the “ALJ”) decision. As explained in ConAgra’s Brief in Support of Exceptions to the Decision of the ALJ, the ALJ erred in determining that ConAgra issued Janette Haines a verbal warning for solicitation in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (hereinafter the “Act”), and the ALJ erred in granting the Acting General Counsel’s amendment to the Amended Complaint and in determining that ConAgra posted and maintained a letter at its Troy, Ohio, facility in violation of Section 8(a)(1) of the Act.<sup>1</sup>

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<sup>1/</sup> ConAgra reasserts and incorporates its argument that the Acting General Counsel’s Amendment to the Amended Complaint violates due process and the posting itself does not violate the Act on its face, which is contained in its Brief in Support of Exceptions to the Decision of the Administrative Law Judge, in this

As made clear from both ConAgra and the Acting General Counsel's briefs relating to such exceptions, the ultimate issue regarding Haines's discipline before the Board is a legal question: Whether the ALJ incorrectly concluded that asking employees on the production floor during working time to sign union authorization cards at a later time constitutes solicitation. While there is no evidence that Haines presented employees Megan Courtaway and Andrea Schipper with an authorization card and asked them to sign it on the production floor during working time, there is ample evidence, to which the Acting General Counsel admits, that Haines did in fact ask Courtaway and Schipper to sign authorization cards, although at a later time, as she had put them in Schipper's locker. As explained in ConAgra's initial exceptions brief and below, Haines's undisputed conduct constituted solicitation and as a result, ConAgra lawfully disciplined Haines for soliciting on the production floor during working time. As a result, ConAgra respectfully requests the Board to dismiss the remaining allegations of the Amended Complaint.

## II. ANALYSIS

### A. **The Only Issue Regarding Haines's Discipline Before the Board is the Legal Question of Whether the Act of Asking Employees to Sign Union Authorization Cards, Even at a Later Time, Constitutes Solicitation.**

To be clear, the ALJ found that there was no evidence "that Haines attempted to have employees sign authorization cards on the production floor." (ALJ Decision p. 8). This is undisputed. As noted in ConAgra's initial exceptions brief, ConAgra does not claim that there is any evidence that Haines was disciplined for actually handing out union authorization cards on the production floor and asking employees to sign them. Rather, ConAgra disciplined Haines because it reasonably believed that Haines was asking employees to sign union authorization

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Reply Brief. It should also be noted that the posting allegedly violating the Act was taken down shortly after the ALJ's decision and is no longer posted at the Troy, Ohio, facility.

cards at a later time on the production floor during working time without actually presenting the cards. ConAgra submits that the act of asking employees to sign union authorization cards, even at a later time, constitutes solicitation and that it gave Haines a verbal discipline because ConAgra reasonably believed that she had asked employees to sign cards at a later time on the production floor during working time. (GC Exh. 5; Tr. 321, 326, 350, 352, 355, 358, 360, 361, 362, 364). *See J.J. Cassone Bakery, Inc.*, 350 NLRB No. 6 (2007) (Respondent must show that it had a reasonable belief that the employee engaged in the misconduct and it acted on that belief when issuing discipline); *U.S. Postal Serv.*, 352 NLRB No. 115 (2008) (“[T]he mere fact that [the employee] did not engage in the misconduct attributed to him does not establish a connection between his protected activities and the discipline.”).

The record is replete with testimony confirming that Haines asked employees Megan Courtaway and Andrea Schipper to sign authorization cards, albeit at a later time, on the production floor during working time. The ALJ did not, and in light of the record, could not have found otherwise. Rather, the ALJ focused his factual inquiry on whether Haines actually asked Courtaway and Schipper to sign authorization cards at the time of her question and not at a later time.<sup>2</sup> (*See* ALJ Decision p. 6-9). As a result, the issue before the Board is legal in nature, specifically whether the ALJ incorrectly concluded that asking an employee to sign an authorization card, at a later time, on the production floor during working time. This is undisputed by the Acting General Counsel as he recognized in his brief that “Courtaway told line lead Amanda that Haines said she was going to put cards in their locker to sign.” (GC Answering Brief p. 4).

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<sup>2</sup>/ Indeed, when distinguishing the *Wal-Mart* Eighth Circuit decision, the ALJ only distinguished it in that the record established that Haines did not have an authorization card on her person and that she made it clear that the authorization cards were in Schipper’s locker. (ALJ Decision p. 9). He did not distinguish, nor find, that Haines did not actually ask Courtaway and Schipper to sign the authorization cards at a later time.

**B. The ALJ Erred in Determining that Asking an Employee to Sign a Union Authorization Card at a Later Time is Not Solicitation.**

ConAgra thoroughly explained its position in its initial brief in support of its exceptions that the ALJ erred in determining that asking an employee to sign a union authorization card, without more, is not solicitation. As such, it will not repeat its analysis here. However, it is important to note that the Acting General Counsel completely misrepresented the law when arguing that ConAgra misconstrued Board law relating to the *Farah Manufacturing Co.*, 187 NLRB 601 (1970) decision. Rather than quoting the entire passage, the Acting General Counsel cherry-picked phrases from the decision that were taken out of context. Indeed, these exact phrases were quoted in ConAgra's initial brief in support of its exceptions, but with respect to the Board's entire passage surrounding such phrases. In that case, the Board stated the following:

Union literature is aimed at informing employees about union matters and/or propagandizing about the virtues of unionization, and its distribution contemplates that the material will very probably be discarded by the recipient once the message is read. The purpose of the authorization card, however, is to provide tangible evidence of effective solicitation, and a request that an employee affix his signature to an authorization card really completes the act of solicitation. The presentation of an authorization card to an employee for signature *in the course of oral solicitation* is therefore necessarily an integral and important part of the solicitation process. And the card's delivery to an employee by the *solicitor—prompted, as it usually is, by the solicited employee's oral declaration of interest*—normally contemplates signature upon receipt and the card's return to the solicitor.

In light of the foregoing, it follows that Respondent's view of its employees "signing up" of others as an act of literature distribution has no legal merit and that its maintenance of a rule banning such activity, *as well as oral solicitation*, in working areas during nonwork time is in violation of Section 8(a)(1) of the Act.

*Id.* at 601-02 (emphasis added). From this analysis, it is clear that the Board consistently separated the act of asking an employee to sign a card from the act of presenting the employee with the card. *Id.* Indeed, in that case, even in categorizing the issue, the Board separated asking an employee to sign a card from actually presenting the card. The Board stated that the issue was “whether the presentation to an employee of a union authorization card for signature, in the course of oral solicitation, is an act of ‘literature distribution,’ rather than an act of ‘solicitation’ within the meanings of the Board’s relevant standards,” indicating that asking an employee to sign an authorization card is an act of solicitation separate and apart from actually presenting a card. *Id.* at 601 (emphasis added). As a result, the *Farah Manufacturing* decision, along with the other decisions cited in ConAgra’s initial exceptions brief, shows it is clear that the Board has long held that asking an employee to sign an authorization card, even without the actual presentation card, constitutes oral solicitation.

### **III. CONCLUSION**

In this case, it was Haines who approached the two employees. It was Haines who admittedly sought to have them sign union authorization cards. Her intent was crystal clear. She was soliciting co-workers to support a union. That is the essence of solicitation, and that is precisely what occurred here. For these reasons and those discussed above, along with those contained in ConAgra’s Brief in Support of Exceptions to the Decision of the Administrative Law Judge, ConAgra respectfully requests the Board to reverse the findings of the ALJ relating to Haines’s verbal warning and the letter posted to employees and dismiss the remaining allegations contained in the Amended Complaint.

Dated this 5th day of July 2013.

CONAGRA FOODS, INC.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 5th day of July 2013, the above and foregoing **ConAgra Foods, Inc.'s Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge** was emailed to the following:

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