NATIONAL LABOR RELATIONS BOARD

UNIFIRST CORPORATION
(Employer)

Case 06-RD-172983

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION ("USW")
(Union)

HOMER J. SUMAN
(Petitioner)

PETITIONER HOMER J. SUMAN'S OPPOSITION
TO USW'S REQUEST FOR REVIEW

Pursuant to Sections 102.67 and 102.69 of the Rules and Regulations of the National Labor Relations Board, Petitioner Homer Suman, by counsel, files this Opposition to the Steelworkers' ("USW") Request for Review. For the reasons set forth below, the USW's Request for Review should be summarily denied and a Certification of Results issued promptly.

I. BACKGROUND

Unifirst Corp. is an industrial laundry employing about 200 people, with 145 or so in the USW unit. Transcript ("TR") 22. Many employees in the USW bargaining unit at Unifirst have long been dissatisfied with the USW's representation. For example, Mr. Suman and other Unifirst employees filed and won a prior decertification election by a

vote of 70-69, only to have that victory snatched away by a divided NLRB. *See Unifirst Corp.*, NLRB No. 06-RD-097418, 361 NLRB No. 1 (2014) (Member Johnson, dissenting). Subsequently, Unifirst employees voted in this election to decertify the USW by an even larger margin, 75 against USW representation to 51 for continued USW representation.

Notwithstanding this electoral rout, the USW filed 21 discrete objections, plus belated "supplemental objections" and parallel ULP charges. The Regional Director dismissed most of the original objections and all of the supplemental objections in an Order dated Nov. 22, 2016. The Regional Director also dismissed all of the parallel ULP charges. At the hearing the USW withdrew Objections 5, 6, 12, 13, and 21 when faced with their obvious lack of proof. TR 206:12 to 206:18. In its Exceptions papers filed on January 11, 2017, the USW withdrew yet again even more of its original Objections. (*See* USW Exceptions to the Hearing Officer's Report, at 1 n. 1). The USW's desperate allegations are getting thinner and thinner, as it clings to power in a bargaining unit that has overwhelmingly rejected its representation.

Indeed, after eight months of post-election delay brought about by the USW's dozens of unfounded charges and allegations, this case boils down to two basic objections: a) that the employer improperly promised certain benefits if the employees decertified, and b) that the employer discriminated against the USW regarding access to certain bulletin boards and mailbox facilities. Both claims are unproven and without merit, as the Hearing Officer and Regional Director properly held. Neither claim has legal or factual support, and neither claim, even if true (arguendo), warrants granting

review under the Board's discretionary standards. This long-delayed election result must be promptly certified.

II. LEGAL STANDARDS

The burden of proof in an election objection lies with the party who files the objection. Moreover, "the burden of proof on parties seeking to have a Board supervised election set aside is a heavy one." *In re Lalique N.A., Inc.*, 339 NLRB 119 (2003). *See also Sonoma Health Care Center*, 342 NLRB 933 (2004) ("An objecting party must show by specific evidence not only that the improper conduct occurred, but also that it interfered with the employees' exercise of free choice to such an extent that it materially affected the results of the election."). The USW has not met this exacting burden here, nor has it shown that any of the Board's criteria for granting review have been met.

Moreover, the Board has long maintained a policy disfavoring disturbing election results because "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees," *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). In evaluating whether improper interference occurred, the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subject to the misconduct; (4) the proximity of the conduct to the election date; (5) the degree of persistence of the misconduct in the minds of the voting unit employees; (6) the extent of dissemination; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the

degree to which the misconduct can be attributed to the party. *See, e.g., Taylor Wharton Division*, 336 NLRB 157, 158 (2001).

Of note, the Board is much more likely to set aside an election where the vote was close, and conversely, less likely to set aside an election where the vote was not close. *See, e.g. Connecticut Health Care Partners*, 325 NLRB 351, 368 (1998) ("[T]he closeness of the vote is an especially significant factor" (internal citations omitted)). Here, the vote was not close by any measure! Unifirst employees voted against the USW in a virtual landslide of 75 to 51, a 60 to 40 percent margin. *See Sonoma Health Care Center*, 342 NLRB 933 (2004) (objectionable conduct did not warrant setting aside the election where the election was decided by a 68-32 margin, noting that its decision was "consistent with at least 30 years of Board and court precedent."). Accordingly, even if the USW had proven objectionable conduct (which it did not), it has a very heavy burden to show that conduct had a *material* effect on the outcome of the election. The USW has not even come close to meeting its burden of proof for any of its Objections and Exceptions to the Hearing Officer's Report, or the Regional Director's decision certifying the election. Nor has it met any of the Board's criteria for granting discretionary review. Accordingly, the Request for Review should be summarily denied and the election result promptly certified.

III. ARGUMENT

A. The Election Was Fair To All.

The election campaign that occurred here is precisely the kind of vigorous contest the NLRA was designed to foster. *Linn v. United Plant Guard Workers Local 114*, 383

U.S. 53, 62 (1966) (internal quotations omitted) (in a union election context, "cases involving speech are to be considered against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks"). Here, all parties fully and freely made their best arguments, in the purest form of "robust free speech and debate." *See* Employer Ex. E-2, including various campaign literature posted by the USW; *see also* TR 86-91 (union and its supporters had full access to post whatever they wanted on the "new" bulletin board). Yet the USW is not content to "let the chips fall where they may." Region 6 was left to deal with the USW's last-ditch Objections and Exceptions to the Hearing Officer's Report, and now this Board is left to deal with a desperation Request for Review. But the USW is canoeing upstream without a paddle.

In *Delta Brands, Inc.*, 344 NLRB 252, 252-53 (2005), the Board explained that it is loath to overturn a secret ballot election:

> It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Id*. Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (internal citation omitted).

See also Werthan Packaging, Inc., 345 NLRB 343, 344 (2005), stating:

> "[T]he burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. . . . An objecting party must show by specific evidence not only that the improper conduct occurred, but also that it interfered with the employees' exercise of free choice . . . ." *Sonoma Health Care Center*, 342 NLRB 933 (2004). That burden has not been met.

Here, a free and fair election was held, with all the hallmarks of robust free speech and debate, and the USW is simply registering a case of sour grapes as it attempts, again, to stay in power despite consecutive losses at the ballot box.

B. The Employer Made No Unlawful Promises Of Benefit.

The Board has long held that an employer can lawfully compare its represented employees' wages and benefits with those of unrepresented employees. *Suburban Journals of Greater St. Louis*, 343 NRLB 157, 159 (2004); *Langdale Forrest Products Co.*, 335 NLRB 602 (2001). An employer may also make statements of historical fact concerning the yearly increases given at other facilities in the past. *Viacom Cablevision*, 267 NLRB 1141, 1142 (1983). Board precedent finds such comparisons lawful where the employer stops short of projecting future benefits if the employees choose to be unrepresented. *Suburban Journals of Greater St. Louis*, 343 NLRB at 159.

Unifirst attorney Peter Kraft testified that when he spoke to employees, it was the employees themselves who brought up a comparison of the benefits paid to nonunion vs. union workers at Unifirst. TR 28. Employees who spoke to Mr. Kraft recognized that they were not being promised anything; they simply wanted to learn about the company's benefits paid to nonunion workers. They also knew that there was a chance they could obtain these same benefits via collective bargaining. Union Ex. 6. Mr. Kraft made it clear to every employee with whom he spoke about benefit comparisons that "I'm not going to promise you anything. Don't assume I am." TR 48.

Indeed, the USW's own unit chairperson, Karen Bergman, admitted that Mr. Kraft did not talk about contractual wages or conditions of employment or benefits during his meetings. TR 75. She also admitted that many terms and conditions of employment, like hours and attendance policy, were not guaranteed under the union contract. TR 77-79. The employee witnesses who testified about their interactions with Mr. Kraft either confirmed they were promised nothing, or could not remember who said what in the few meetings that were held. TR 114-15; 74-75; 124:7-9; 125-26, 158-59.

Finally, Mr. Kraft testified in detail about exactly what he said – and did not say – to employees at the two meetings, and one thing is clear: no Unifirst agent ever stated or implied that employees would receive a benefit if they voted out the USW.

C. There Was No Discrimination With Regard To Bulletin Boards or Facilities Usage.

The USW had its own bulletin board in the facility where it could post whatever it wanted, and could even remove any posting it did not like. Employees opposing the USW had no specific place to post flyers, and anti-union flyers were flooding the plant and being placed randomly on walls. For this reason, in the period prior to the election, Unifirst created an entirely new bulletin board, and gave *all* employees access to that new forum as a means of imposing some order on the various postings. TR 186-90. Any and every employee could post on this new bulletin board without regard to union support or not. Union representative Bergman admitted this, and even admitted to posting pro-union flyers on that new bulletin board without hindrance. TR 85:10 to 85:23. When USW representative Bergman was asked "Were any pro-Union postings that were placed on the

new employee bulletin boards ever removed?," her answer was "No". TR 93:21 to 93:23; see also TR 178-79 (in which union official Toni DiGiacobbe recognized that the new bulletin board contained some pro-union postings as well as anti-USW postings). None of this could possibly constitute objectionable conduct.

Finally, the USW objects because one employee put an anti-union letter in the mailboxes used by route service representatives ("RSRs"). But those mailboxes are open to all employees, and in the past solicitations for, *inter alia*, horseshoe tournaments and girl scout cookies have been placed in them by various employees. TR 191-92. None of this could possibly constitute objectionable conduct.

CONCLUSION: Petitioner Homer Suman opposes the USW's Request for Review, which is little more than sour grapes by a defeated union. The USW's objections are all unproven as a factual matter and meritless as a legal matter. The USW has not met this Board's criteria for granting discretionary review. In short, Mr. Suman – after 8 months of delay – requests prompt certification of the results of his election.

Respectfully submitted,

/s/ Glenn M. Taubman

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Opposition To USW's Request for Review was e-filed with the Executive Secretary and was also served on the parties and persons listed below by e-mail, on this 3rd day of February, 2017:

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