

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

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DOMINO'S PIZZA LLC :
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 Employer :
 :
 and : Case 29-RC-214227
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 LOCAL 91, UNITED CRAFTS AND :
 INDUSTRIAL WORKERS UNION :
 :
 Petitioner :
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**OPPOSITION OF PETITIONER LOCAL 91
TO EMPLOYER'S REQUEST FOR REVIEW**

Statement of the Case

A representation election was held on March 16, 2018 to determine if workers wanted to be represented for collective bargaining by petitioner Local 91, United Crafts and Industrial Workers Union. Excluded from the voting unit were: all guards and supervisors as defined by the Act, including Assistant Managers and General Managers. The Tally of Ballots showed 26 votes for union representation, 11 votes against union representation, and 7 challenged ballots, with challenges thus being numerically insufficient to affect the outcome. Objections were filed by Domino's which were tried on April 16 through April 20, 2018.

By Decision and Certification of Representative issued on September 14, 2017, the Regional Director ("RD") found, contrary to the Hearing Officer, that the Stipulation for the election under which Assistant Managers were said to be "supervisors" was binding upon the petitioner Local 91 and that therefore, for purposes of determining whether alleged *pro-union*

activities of Assistant Managers Samad Hussan and Radwon Hussin (“A-M”, “Radwon”, “Samad”) were objectionable conduct wanting setting aside the election, Radwon and Samad were statutory supervisors. However, the RD, like the Hearing Officer, found that the conduct of Samad and Radwon which was substantiated did not warrant setting the election aside.

This matter is now before the Board on Domino’s Request for Review dated October 12, 2018. (“RFR”)

Standard

The standard for determination of this RFR is found in the Rules and Regulations § 102.67(d):

(d) Grounds for review. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The proponent of review – here, Domino’s, whose Objections were overruled – must show in a self-contained document that it has met the grounds. R&R § 102.67(e). It is wholly proper to deny review without reviewing the entire record, and this is supportable by the Act’s policy of expeditiously resolving questions concerning representation. *Northeastern University*, 261 NLRB 1001, 1002 (1982); *Colonial Manor 1977*, 253 NLRB 1183, 1184-85 (1981); *Walker County Med. Ctr.*, 260 NLRB 862, 863 (1982). It is incumbent upon Domino’s to show that full review is warranted on the regulatory grounds. This, it has failed to do.

I. CREDITED OBJECTIONABLE SUPERVISORY CONDUCT DID NOT MATERIALLY AFFECT THE ELECTION OUTCOME,¹ AND DOMINO'S HAS FAILED TO SHOW ERROR IN THE FINDING TO THAT EFFECT.

The second prong of *Harborside Healthcare*, 343 NLRB 906 (2004), the lead case on supervisory prounion conduct, requires consideration of :

“Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.”

Id. at 909. Further, the Board views “...the employer's antiunion stance as relevant to the second prong of the test – that is, whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election... an employer’s antiunion campaign may mitigate the coercive effect of impermissible prounion supervisory authority.” *Id.* at 914. The Board has found it significant that where the employer has made it clear that it does not support unionization by its own antiunion campaign, prounion supervisory conduct may thereby be sufficiently mitigated, and an election need not be set aside. *SSC Mystic Operating Co., v. NLRB*, 801 F.3d 302 (DC Cir. 2015).

Domino’s antiunion campaign. Domino’s has – as it must in order to make an arguable case for review – completely and utterly ignored its own antiunion campaign, and the effect of that campaign in not only mitigating but altogether negating any impermissible “coercion” caused by prounion supervisory conduct.

The RD accurately summarized the evidenced regarding the Employer’s campaign thus:

¹ Scientists and metaphysicians have wrestled since 1883 with the question of whether a tree falling in a forest with nobody to hear it makes a sound. https://en.wikipedia.org/wiki/If_a_tree_falls_in_a_forest The NLRB takes a practical approach. If the conduct would not have affected the election – for example, because not known to a large enough number of voters – then that is the end of the matter.

“credited record evidence shows that the Employer engaged in an extensive campaign to advise employees of its stance against the Union. Indeed, high level managers conducted one or two mandatory meetings a week during the critical period, i.e., from six to twelve meetings. Director of Corporate Operations Machim led meetings and told the employees that they did not need the Union. The meetings lasted one to two hours. Credited employee testimony indicates high employee attendance at the Employer's meetings. Indeed, the Employer admits managers filled in for unit employees in the store during the meetings and all employees on the clock were required to attend. The Employer also posted at least ten notices containing their message that employees did not need the Union. Five higher managers conducted "ride-alongs" with drivers; almost every night, two to twelve ride-alongs occurred. On ride-alongs, a higher manager spoke directly with a driver on an individual basis, topics discussed included that Domino's already gave employees certain benefits; that the Union's chief executive officer went to jail; that employees did not need a Union; that they should make up their own minds and "you shouldn't just go for it because somebody tells you."

RD Decision at 24.

It is not disputed by Domino's in its RFR that it mounted a powerful campaign against the Union, and that therefore no voter or voters could possibly have been confused as to what was Domino's desire for which way workers should vote. The Board has found that lack of confusion as to the employer's antiunion stance is significant. *Northeast Iowa Tel. Co.*, 346 NLRB 465, 467 (2006). There was no extensive antiunion campaign by the employer in *Northeast Iowa Telephone*; rather, there was a simple admission that the employer "made clear" his antiunion views. *Id.* at 466. In view of the limited conduct and authority of the managers at issue in *Northeast Iowa*, the Board found that the supervisors' prounion conduct was mitigated by the employer's clearly known antiunion views, overruled the employer's objections, and certified the union as representative.

The specific five factors of the second prong of the *Harborside* test are a mixed bag but generally do not militate against overruling Domino's objections, and therefore against denying review.

Margin of victory. The Union won by a margin of 15 votes; this is reduced to 8 votes, if all 7 challenged ballots are counted as “no” votes – an unlikely probability. Domino’s needs to show that objectionable conduct affected at least 4 voters.² It cannot do so, and was found to have affected at most 3 voters. Domino’s tries to beef up the 2 voters found to have been solicited to sign cards by noting that Radwon told 2 other voters that 30 of their co-workers had signed cards. Of its various arguments why this should be deemed coercive even absent an actual solicitation *per se*, the most spurious is that even mentioning the topic to voting unit employees gave him the opportunity to observe their reactions. If this were the standard, no employer or employer representative would be allowed even to speak to employees about unionization, but of course this is not the standard. Indeed employers are permitted to speak to employees about unionization and express their negative opinions, even though it gives them the opportunity to observe reactions and gauge union support. It must be remembered that *Harborside* established a rule that any supervisory card solicitation is inherently coercive, regardless of other factors. There is no reason to expand the meaning of card solicitation to cover any and all conversations about the union.

Conduct at issue widespread or isolated; extent conduct known. There is no evidence that the effects of credited coercive conduct were widespread. The credited conduct relates to only one Assistant-Manager, Radwon.³ The conduct credited and found to be coercive was solicitation of cards from 2 employees, telling employee Asifuo Islam to vote for the union, and putting a former supervisor on speakerphone with the same Asifuo Islam and remaining silent

² Domino’s correctly asserts that the RD erred in saying that 8 voters would need to be flipped to change the election. The correct number is indeed 4, but it does not matter, since only 3 voters were found to have been affected by prounion supervisory conduct.

³ Domino’s asserts that the RD erred in declining to reverse the Hearing Officer’s finding that evidence supporting the objection regarding prounion conduct of Samad was not credible. Domino’s made no argument beyond the naked assertion of error.

when that former supervisor told Islam that if Domino's won the election, employees would be transferred to other stores where they could be disciplined, including termination. There was no evidence that this conduct went beyond the 3 employees noted or that it was known by any other employees to have occurred. Domino's asserted in its brief in support of finding that more than 2 employees had been solicited to sign cards that presentation of an actual card or a specific request that someone sign a card is not necessary in order to find that solicitation has occurred. Domino's RFR at 18. However, this attempt to bootstrap a general comment into being a solicitation has no legal support; the cases cited by Domino's⁴ pertain to whether an employee may be said to have violated a no-solicitation rule without the presentation of an actual card or request to sign one. They are irrelevant for the purposes of this case's analysis.

Timing and lingering effect of the conduct. As a matter of Board law, the RD acknowledged that the passage of 3 months between card solicitation and an election does not mitigate the inherent coercion. However, since the employees solicited by Radwon did not take cards, the RD found that there was no lingering effect. Domino's has made no meritorious argument why this logic does not follow. There was no evidence when Radwon told Islam to vote for the union. The speakerphone conversation involving Islam was said to have occurred during the critical period between the petition and the election. If its effect lingered, it was an effect on one employee.

⁴ *Uniflite*, 233 NLRB 1108 (1977); *The J.L. Hudson Co.*, 198 NLRB 172 (1977). N.B; the RFR's description of the *Uniflite* case was lifted verbatim from *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1087 (8th Cir. 2016), a § 8(a)(3) case about alleged discriminatory discipline for violation of a no-solicitation rule which closely scrutinized what constituted "solicitation" for that purpose.

II. THE EVIDENCE SUPPORTS ONLY MINIMAL COERCION BASED ON SUPERVISORY CONDUCT, AND DOMINO'S HAS FAILED TO SHOW ERROR IN THAT FINDING.

The first prong of *Harborside Healthcare*, 343 NLRB 906 (2004), requires consideration of :

“Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.

“This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.”

Id. at 909. It is only if asserted instances of coercive supervisory conduct can meet this criterion that they continue on to be analyzed against the second prong of the *Harborside* test discussed in the previous section of this Opposition. Only 3 instances of alleged coercive conduct made it past the screening of this first prong : card solicitation from 2 employees; telling a third employee to vote for the union; and the speakerphone incident involving that same third employee. Domino's has failed to show error warranting review in the RD's findings that other asserted instances of coercive conduct either were properly not credited or were in fact not coercive.

Nature and degree of supervisory authority. This factor underlies all of Domino's objections and exceptions and its Request for Review, and it tilts heavily against setting the election aside. Radwon had a low, sharply limited level of supervisory authority, as the RD correctly found. There was simply no evidence, for example, that Radwon possessed any disciplinary authority, let along authority to discharge or cause discharge, which supports the RD's finding that commentary about job loss by Radwon did not tend to coerce. There is no evidence that he or Samad had ever written anybody up, given any warning, verbal or otherwise, suspended anybody, discharged anybody, or effectively recommended any of the foregoing. Domino's argues that actual authority to discharge is not needed. Law that is said by Domino's

to support the proposition that it does not matter if a prounion supervisor does not himself have the authority to discharge somebody rely on the supervisor's ability to effectively recommend discharge. The perceived authority to effectively recommend is key. This made the threat a real threat. Therefore, it does indeed make a difference whether the supervisor is prounion or antiunion; it would be absurd to think about a prounion supervisor effectively causing the Employer to discharge somebody for opposing the union and supporting the employer. The further argument that it is sufficient that the supervisor may be insinuating that other higher-ups may discharge people, including perhaps even the supervisor himself, if the union loses, lacks merit; the logic is tortured. If the insinuation is itself sufficient, as suggested by Domino's, then there is no significance to Radwon being a supervisor. Any employee might make a depressing prediction about the possible results of failure to succeed in unionization. This reasoning has wandered far away from the topic of prounion supervisory conduct.

Likewise, there was no evidence that Radwon had the authority to give anybody any of the benefits allegedly promised by Radwon if the union should win the election: pay raises, ability to work any desired hours, vacation. Domino's argues that the cases relied on by the RD speak merely of supervisory discussion of the benefits that a union might obtain for them. Domino's attempts to make Radwon's comments into something more by calling them "what the Union would specifically get them in exchange for their vote." Domino's RFR at 27. There is no difference. Everybody knows that promises of benefits are objectionable only if the party making the promise has the power to carry it out, to make it happen; it even says so on Notices of Election. Employees generally understand that the union gets benefits only through the process of negotiation. *The Smith Company*, 192 NLRB 1098 (1971). Domino's makes no cogent argument that Radwon had the power to implement any of these promises, rather than their being

benefits that the union would obtain through bargaining. Domino's simply asserts that Assistant Managers sometimes were the highest level of management in the store; that says nothing about power to give a pay increase. Domino's RFR at 27. Domino's citations to the transcript all reference hypothetical authority of Assistant Managers in general and following by Assistant Managers in general of strict policies and procedures for how to make up a schedule. Domino's does not argue that there was any evidence that Radwon ever exercised the kinds of authority under discussion, and there was no evidence that anybody had the kind of discretionary authority over schedules as to be able to reward or punish employees.

Nature, extent and context of conduct. Notwithstanding Domino's efforts to make Radwon's activities sound like more than they were, the RD was correct in determining that Radwon's conduct regarding union meetings was not coercive. The evidence showed that he passed a few text messages back and forth with the union regarding scheduling of meetings. The RD correctly found that there was no evidence that Radwon spoke at a union meeting, solicited cards or required employees to attend. The cases cited by the RD firmly support her position. The prounion conduct in both *Northeast Iowa Telephone*, 346 NLRB 465 (2006), and *Stevenson Equipment Co.*, 174 NLRB 865 (1969), was more extensive than that of Radwon.

CONCLUSIONS

For all of the foregoing reasons, Domino's Request for Review should be denied.

Dated: Elmsford, New York
October 26, 2018

s/ Steven H. Kern

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STATEMENT OF SERVICE

The undersigned hereby certifies that on October 26, 2018, I served the within Opposition of Local 91 to Employer's Request For Review by email to each of the following addressed as follows, and by electronically filing the same with the Regional Director of the NLRB, Region 29 :

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