

**OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

IN RE: RICHARD GALVAN,)	Protest Decision 2011 ESD 238
)	Issued: April 27, 2011
Protestor.)	OES Case No. P-139-021511-FW
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Richard Galvan, member of Local Union 396, filed a pre-election protest pursuant to Article XIII, Section 2(b) of the Rules for the 2010-2011 IBT International Union Delegate and Officer Election (“*Rules*”). The protest alleged that members and supporters of the Herrera slate improperly interfered with his campaign rights.

Election Supervisor representative Maureen Geraghty investigated this protest.

Findings of Fact

Local Union 396 is entitled to 13 delegates and 13 alternate delegates to the IBT convention. Two slates of candidates were nominated on January 8, 2011. The Ron Herrera slate, led by local union officers and business agents, competed against the Galvan Respect and Dignity slate, comprised of stewards and rank-and-file members. At the tally conducted March 1, the Herrera slate won with more than 65% of votes cast.

After ballots were mailed on February 8, Galvan slate members and supporters went to the UPS Olympic hub in Los Angeles, California on Friday, February 11 at 5 p.m. to distribute campaign literature to members employed there.

UPS-Olympic has two employee parking lots, both located across a public street from the worksite. To reach the facility from their vehicles, employees cross the street to a public sidewalk and then turn up the sidewalk to the main employee entrance. Galvan and other campaigners took up positions in the parking lots and on the public sidewalk and adjacent grass next to the employee entrance and leafleted employees entering and leaving the facility. The vast majority of members working that day entered or exited the hub between 5:30 and 8 p.m. that evening.

Members and supporters of the Herrera slate began arriving at the same area outside UPS-Olympic at about 6 p.m. the same day. For about two hours, the opposing factions leafleted in the two areas described. In total, some twelve Galvan and fifteen Herrera campaigners were present that evening.

During this period, contentious banter carried on between the factions, with Herrera campaigners accusing Galvan of being a quitter because he previously worked for Local Union 396. Miguel Lechuga, a Herrera supporter, loudly told members leaving the facility not to vote for the Galvan slate, and Juan Gutierrez, another Herrera supporter, challenged UPS employees entering and exiting the hub to ask Galvan why he quit the local union. David Castro, a Herrera slate delegate candidate who also served as business agent at UPS-Olympic, walked alongside employees leaving the facility, asking for their votes and telling them not to vote for Galvan or

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his slate. Galvan campaigners responded to some of the banter and accused the Herrera supporters of ignoring members' interests.

At approximately 7:45 p.m., David Martinez arrived to campaign for the Galvan slate. Martinez is a shop steward at the UPS San Fernando hub and was a Galvan slate delegate candidate. Martinez walked between the two groups for a while to "check things out." He told our investigator he noticed Enrique Cisneros staring at him from sixty feet away, so he stared back intently. Cisneros is a UPS business agent and was a Herrera slate supporter. Martinez stated that Cisneros then yelled at him and asked him what he was staring at. Martinez yelled in reply, asking Cisneros what he was staring at. The exchange went back and forth a few times. Martinez stated Cisneros then walked toward him briskly, stopped a few feet from him, and stated angrily: "I will 'f' you up, I will kick your ass. I don't give a shit if I lose my job. I will kick your ass." Martinez claimed Cisneros' fist was balled as he approached but he unclenched it when he got next to him. He stated he thought Cisneros was going to hit him but admitted Cisneros never raised his arm or fist or exhibited any physical gesture besides walking quickly toward him. However, Cisneros' quick approach caused Martinez to believe a punch from Cisneros was imminent.

Galvan witnessed Cisneros approach Martinez from forty feet away. Although Galvan said Cisneros' fist was not balled or clenched at any time, Galvan nonetheless moved quickly to Martinez's side. He then confronted Cisneros, saying, "Yes, Enrique, you're a tough guy; yeah, you're a real tough guy; yeah, you're a big guy." Cisneros and Galvan then traded insults about each other's wife, with Cisneros threatening to kick Galvan's ass and Galvan continuing to taunt Cisneros about what a tough, big guy he was. Galvan stated he moved next to Martinez because he was not personally afraid of Cisneros and wanted to be able to protect Martinez in the event Cisneros tried to punch him.

Martinez stated his exchange with Cisneros quickly turned absurd and comical. Herrera supporters soon surrounded Cisneros and pushed him backwards, away from Galvan and Martinez. At about the same time, a female member walking nearby challenged the men to stop arguing and insulting one another, saying it made them all look bad. As Herrera supporters pushed Cisneros away from Martinez, Martinez called after them: "So Enrique, you are going to 'f' me up, right?" He said Cisneros replied: "That's right." The men then stopped insulting each other and resumed campaigning without further incident or provocation. Following the exchange, Cisneros was quiet for the remaining hour he campaigned at the hub.

Martinez stated he later concluded Cisneros never intended to hit him but instead was trying to cause some drama and be an agitator. Martinez surmised that Cisneros was trying to incite Martinez to hit him. Martinez decided later that day that the whole situation was a joke and no one from the Herrera slate intended to fight, although Martinez still believes Cisneros may try to beat him up at some point. Martinez has not filed a police report and did not speak to UPS security present during the incident about his concerns for his physical safety or the verbal threats.

Cisneros stated Martinez acted antagonistically from the moment he arrived, striding aggressively among the Herrera supporters with his chest pumped out, saying loudly: "Give me the fucking campaign literature." Cisneros was standing to the side, watching members

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campaign when he noticed Martinez staring at him. Cisneros denied he made any verbal or physical threat toward Martinez or Galvan and instead stated he walked up to Martinez because he thought Martinez was gesturing toward him. He claimed Galvan immediately came up to him from fifty feet away and began taunting him and pointing a finger in his face, saying; “Oh yeah, Enrique, you’re a tough guy, you’re a real tough guy.” He denied he had any intention to hit Martinez and denied he made any physical gesture or movement indicating he was about to hit Martinez.

Galvan said the friction and verbal conflict between the factions and the attempts by Herrera slate members to shadow employees as they walked from the hub exit to the parking lots interfered with members’ rights to receive information about his campaign. Galvan did not know how many members were prevented from hearing his campaign message as a result of the conduct of the Herrera slate members and supporters.

UPS contracts with Securitas Security to provide security for the parking lot areas and property adjacent to the hub. Galvan and Martinez both stated security personnel were present and observed the incident; neither requested assistance from or complained to Securitas personnel. UPS also had security personnel inside the hub who were available that day to address security or safety issues. Galvan and Martinez did not report the matter to UPS security either. Securitas employees and UPS guards were aware that the two slates were verbally sparring but did not witness any physical confrontation or hear any verbal threats and did not investigate, intervene or file a report.

Witnesses agreed that both factions were swearing at each other, with a few individuals threatening to “kick ass,” and that Cisneros and Martinez squared off for a few moments before Galvan intervened and began taunting Cisneros. Witnesses also stated that Herrera campaigners moved Cisneros away from Martinez and Galvan and that he remained quiet for the duration of the evening. Accordingly, we credit Martinez’ evidence that Cisneros made a verbal threat against him.

Analysis

This case presents the issue of members’ right to campaign without interference and free from threat of retaliation.

Article VII, Section 12(a) of the *Rules* protects members’ right to campaign; it also grants “the reciprocal right to hear or otherwise receive such campaign advocacy.”

Past decisions recognize that loud and sensational language is part of the election process, and the *Rules* do not bar that sort of zealous campaigning. *Jorgensen*, 2000 EAD 72 (December 26, 2000); *Rodriguez*, 2000 EAD 45 (November 3, 2000); *Yocum*, 2000 EAD 18 (September 1, 2000) (loud, rude and obnoxious behavior of union steward as member attempted to have other members sign petition not unlawful); *Wasilewski*, 2000 EAD 14 (August 14, 2000) (words exchanged between two sides in the context of petitions being signed); *Rudolph*, P861 (August 29, 1996) (no violation where tempers flared briefly on each side, words were exchanged and a few pushes); *Zuckerman*, 2005 ESD 38 (December 15, 2005) (no violation where campaigner’s conduct was “loud, rude and obnoxious” but stopped short of physical violence). We look to the

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totality of the circumstances to determine whether vulgar or threatening language so interferes with the right to campaign that it violates the *Rules*. *Williams*, 2001 EAD 201 (February 27, 2001).

Conduct that goes beyond zealous campaigning and escalates to such a level that it drives union members away from the vicinity of campaign activity effectively deprives members of their reciprocal right to receive literature and/or solicitations of support. We exercise care in evaluating such conduct, for members also have the right to hear and assess the value of the opposing campaign message as well.

In this case, we find the verbal taunts and criticisms did not substantially interfere with or deny the right of the Galvan campaigners to campaign among the members employed at UPS-Olympic. Both sides stated that members employed there received campaign literature as they entered and exited the facility. Although Galvan asserted that some members shied away from campaigners to avoid being entangled in the banter or because Herrera campaigners were openly critical of the Galvan slate, we find that the anti-Galvan message the Herrera campaigners were expressing also had the protection of the *Rules*. Moreover, the facts demonstrated that Galvan campaigned at the facility for more than three hours on February 11 and had ample opportunity to campaign throughout the evening. Accordingly, we find that the Galvan campaigners were not denied their right to campaign at UPS-Olympic.

We turn next to the verbal threat Cisneros made against Martinez. Article VII, Section 12(g) prohibits retaliation or threat of retaliation for activity protected by the *Rules*. Under this provision, a threat of violence can constitute intimidation and retaliation. However, the threat must be immediate and serious to amount to a *Rules* violation. *Cooper*, 2005 ESD 8 (September 2, 2005).

We find that Cisneros' behavior did not create a palpable threat of imminent harm and therefore did not violate this provision. Cisneros stopped before he reached Martinez. He did not raise his hand or arm toward Martinez and made no other physical gesture signaling he intended to hit him, and he did not clench his fist when he was closest to Martinez. Further, although Martinez had the opportunity to retreat, he did not do so, suggesting he believed it unlikely that Cisneros would strike him. Moreover, after a female member criticized both sides, both sides withdrew and the situation was defused. Although we credit Martinez's assertions that Cisneros threatened to beat him up, the verbal threat was inconsistent with his physical conduct and demeanor. Martinez himself considered the exchange absurd and comical in retrospect.

Accordingly, we DENY the protest.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within two (2) working days of receipt of this decision. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Supervisor in any such appeal. Requests for a hearing shall be made in writing, shall specify the basis for the appeal, and shall be served upon:

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Kenneth Conboy
Election Appeals Master
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022
Fax: (212) 751-4864

Copies of the request for hearing must be served upon the parties, as well as upon the Election Supervisor for the International Brotherhood of Teamsters, 1801 K Street, N.W., Suite 421 L, Washington, D.C. 20006, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

Richard W. Mark
Election Supervisor

cc: Kenneth Conboy
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