IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HILDA L. SOLIS,	)	
Secretary of Labor,	)	
United States Department of Labor,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civil Action No. JKB-09-3375**
LOCAL 9477,	)	
UNITED STEELWORKERS,	)	
	)	
	)	
	)	
Defendant.	)	
	)	

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Hilda L. Solis, Secretary of Labor, United States Department of Labor ("Department" or "Secretary"), by the undersigned counsel, respectfully submits this Reply Memorandum in Support of her Motion for Summary Judgment.

I. INTRODUCTION

In its Motion for Summary Judgment, the Department established that the union election at issue in this case was tainted by violations of section 401(g) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 481(g) (LMRDA or the Act) and that those violations may have affected the outcome of the election. In its Opposition, Defendant has neither undermined the Department's evidence nor met its burden of proving that the violations did not affect the outcome of the election. Accordingly, Plaintiff is entitled to judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 56.

II. ARGUMENT

A. Plaintiff Has Met Its Burden of Establishing a Violation of the Statute and Defendant Has Not Met Its Burden of Establishing that the Violation Did Not Affect the Outcome of the Election.

Section 402 of the LMRDA requires a district court to declare a contested election void and order a new election under the supervision of the Secretary if the Secretary establishes that a violation of section 401 "may have affected the outcome of the election." 29 U.S.C. § 482(c). The Secretary establishes a *prima facie* case by presenting facts that support a finding of any of the alleged LMRDA violations. *Wirtz v. Hotel, Motel & Club Emp. Union, Local 6*, 391 U.S. 492, 507 (1968). The *prima facie* case presumes that there is a "meaningful relation" between the violation and the election results. *Hotel, Local 6*, 391 U.S. at 507; *Solis v. Am. Fed'n of Gov't Emp.,* 763 F. Supp. 2d 154, 166 (D. D.C. 2011) Once a violation is established, it is the defendant's burden to establish that the violations did not affect the outcome of the election. *See Hotel, Local 6*, 391 U.S. at 507.

In this case, the Department has established three separate violations of section 401(g), each of which independently supports a finding that there was a violation that may have affected the outcome of the election. *See* Paper No. 26 at 15-17, 25-26. The evidence supplied by Defendant consists primarily of speculation concerning the identity and motives of the individuals committing the violations. Such speculation is insufficient for Defendant to create a genuine issue of material fact and withstand summary judgment. *See JKC Holding Co. v. Washington Sports Ventures, Inc*., 264 F.3d 459, 465 (4th Cir. 2001). Even if Defendant's speculations as to identity or motive were true, they are immaterial. Nothing in section 401(g) of the LMRDA requires that the violation be committed by a particular party or with a specific motive. Rather, any use of a union's or an employer's resource is prohibited, regardless of the

employer's or union's intent. *Donovan v. Local 70, Int'l Bhd. of Teamsters*, 661 F.2d 1199 (9th Cir. 1981) (use of employer's van to display campaign message violated section 401(g) even though employer had no knowledge that his van was used for campaign purposes). *Dole v. Local Union 226, Hotel & Restaurant Employees*, 718 F. Supp. 1479, 1484 (D. Nev. 1989) (union's payment of former incumbent's printing bill violated section 401(g), even though union paid bill by mistake).

1. Plaintiff Has Met Its Burden of Establishing a Violation and Defendant Failed to Produce Sufficient Evidence to Support a Finding that Use of the Employer's Fax Machine Did Not Affect the Outcome of the Election.

The Secretary established that the Mikula campaign flyer was transmitted using the employer's fax machine in the Union Annex and that copies of that fax were posted in specific areas, in sufficient quantities that may have affected the outcome of the election for all offices won by the incumbent Red White and Blue (RWB) slate. *See* Paper No. 26 at 15-17, 25-26. Defendant does not dispute that the fax was sent by the employer's equipment and posted, but rather it attempts to undermine any conclusion that the material was faxed by Mikula. Both the April 3 fax discussed by Defendant (*see* Paper No. 31 at 3-4) and the April 6 fax that is the subject of this violation were transmitted from the Union Annex. Even if Mikula faxed the campaign list on April 3, Defendant has provided no evidence that Mikula or another union member did not fax the campaign literature from the Union Annex on April 6. In any event, as the Secretary made clear in her brief, the identity of the person who transmitted the fax and who posted it are not material to establishing a violation of section 401(g). It is the transmission itself which is the violation. *See* Paper No. 26 at 17. The Secretary's motion cannot be defeated by a factual dispute about who transmitted the fax because that fact is simply not material to the finding of the violation. *See JKC Holding Co. LLC*, 264 F.3d at 465 (existence of alleged factual

dispute will not defeat motion for summary judgment unless disputed fact is one that might affect outcome of litigation.)

Defendant also offers unsupported speculation that the Mikula flyer was transmitted by a supporter of the United Steelworkers for Action (USA) slate, apparently on the theory that the USA slate was campaigning for its opposition using employer equipment in order to create statutory violations. Defendant has provided no evidence to support this assertion or to create a genuine issue of material fact. Accordingly, Plaintiff is entitled to summary judgment on this ground.

2. Defendant Failed to Produce Sufficient Evidence to Support a Finding that the Violation Did Not Occur or that the Use of Sparrows Point's Copiers to Reproduce Incumbent Slate Campaign Materials Did Not Affect the Outcome of the Election.

With respect to the use of employer copiers to reproduce campaign material, Defendant again focuses on absolving the incumbent officers and their campaign of responsibility for the violation rather than producing evidence that the violation did not occur. Defendant acknowledges that a member of the campaign gave Juarascio campaign literature and instructed him to distribute it in his department. *See* Paper No. 31 at 5 and Exh. 2. Defendant argues that if Juarascio copied and distributed the literature as he claims, "he acted on his own," "beyond his actual or implied authority," and that the "distribution of Mikula's fliers and the broad distribution beyond lunch and locker rooms may well have been Juarascio's misguided plan to help a friend." *Id.* at 5-6. Motive or "authority" is immaterial to the violation, however, because the union's intent is not a factor in determining whether section 401(g) has been violated. *See Usery v. Stove, Furnace & Allied Appliance Workers Int'l Union,* 547 F.2d 1043, 1045 (8th Cir. 1977). Defendant has produced no evidence contradicting Juarascio's statement that he copied and distributed 400 copies of the 2-page Cirri letter, a violation that could have affected the

outcome of the election. The evidence shows that 193 members voted in Zone 5, the area under Juarascio's jurisdiction at the time of the election.

Defendant speculates as to Juarascio's motive for providing affidavits to the Secretary, conjecturing that he "would do whatever necessary to get his job back." Paper No. 31 at 8 and Exh. 17. Defendant also speculates that the distribution of the older 2-page Cirri letter when a more recent 8-page Cirri letter was available must have been an "error," more likely made by someone attempting to undermine an incumbent victory. *Id.* at 7. Both arguments are nothing more than conjecture, which is insufficient to defeat Plaintiff's Motion for Summary Judgment.

Finally, Defendant argues that the Cirri 2-page letter did not constitute campaign material because the content of that document was directed to the International Convention's May 19, 2008 delegate election, and not the April 20, 2009 election. That the letter discussed a previously held convention is of no legal significance; what is material is that the content of the letter criticized the USA slate and the letter was distributed within a month of the April 20, 2009 election. *See Usery v Int'l Org. of Masters, Mates, and Pilots,* 538 F.2d 946, 948-949 (2d Cir. 1976) (newsletter praising one candidate and criticizing another is a violation, even though not relating directly to election).

Accordingly, summary judgment should be entered in the Secretary's favor because Defendant failed to show that a violation did not occur or that use of the copiers did not affect the election outcome.

3. Defendant Has Failed to Produce Sufficient Evidence to Support a Finding that the Use of Sparrows Point's Email System Did Not Affect the Outcome of the Election.

Defendant has admitted every element necessary to establish that the Sparrows Point's email system was used to coordinate the distribution of the RWB slate's campaign material.[1] Although there do not yet appear any cases addressing the use of employer email to coordinate campaign activity, section 401(g) directly prohibits the use of employer resources to "promote the candidacy" of any person. This provision has been found to apply to anything "of value," including such intangible assets as access to non-public areas of an employer's property, without providing such access to all candidates violated section 401(g). *See Local Union 226,* 718 F. Supp. at 1484-1485. It stands to reason that where something as intangible as access has been deemed to be "a thing of value," then the employer's email system, a tangible technology, similarly constitutes "a thing of value." Indeed, there is no difference – nor has Defendant offered any – between the unauthorized use of the email system and that of faxes or copiers.

The Secretary has established a *prima facie* case that there is a meaningful relation between the violation and its effect on the outcome of the election. It is undisputed that the email was transmitted to 14 union representatives who distributed campaign literature based on that communication. The burden here is on Defendant, not the Secretary, to show that the use of the employer's email system to facilitate the distribution of a large number of campaign flyers did not affect the outcome of the election. *See Hodgson v. Local 734, Int'l Bhd. of Teamsters,* 336 F. Supp. 1243, 1250 (N.D. Ill. 1972). Defendant has failed to meet its burden here.

[1] The 8-page Cirri letter was campaign literature. *See* Paper No. 31 at 9. The email in question assisted in organizing the distribution two days after its issuance. *See id.* The email partially facilitated the distribution of campaign literature. *See id.* at 10. The Cirri 8-page letter was distributed at Sparrows Point gates. *See id.* at 9.

Defendant argues that it would have used another mode to distribute its campaign material had the employer's email system not been available. This argument is beside the point. It is always possible that a union's own, lawful resources might have been used if the employer resource was not available. This in no way negates the plain fact that the union did use the employer resource in violation of the LMRDA in this case.

Defendant asserts that, in addition to the 14 email recipients, nine additional RWB supporters assisted in the dissemination of Cirri's 8-page campaign material. Defendant has produced no concrete evidence establishing that these additional supporters actually handed out literature, or the number of pieces of literature they handed out. Moreover, the assertion is of no legal significance because even if other supporters lawfully distributed campaign literature at employee gates, Defendant has not demonstrated how such distribution would negate or lessen the effect on outcome produced by the literature distributed by the 14 email recipients.

Defendant also appears to argue that the Secretary ignores the essentially equitable nature of the LMRDA. *See* Paper No. 31 at 10. However, section 401(g)'s prohibition is unambiguous and applies regardless the minimal value of the resource at issue. *See* Paper No. 26 at 14, 17. That a court may have equitable discretion in the details of the remedy imposed where a violation is found in no way mandates or otherwise authorizes a court simply to disregard a violation of section 401(g). There is no genuine issue with respect to any material fact concerning the use of the employer's email to coordinate the RWB's slate's promotion of its members' candidacies, nor to the probable effect of that violation. Accordingly, Plaintiff is entitled to summary judgment on this ground.

B. Defendant Cannot Offset Violations Committed by Local 9477 with Allegations that There Were Other Violations Committed by the USA Slate.

Finally, Defendant argues that the USA slate committed numerous violations of the Act that offset any effect on the outcome of the election caused by its violations. *See* Paper No. 31 at 11. Defendant relies on cases holding that the Secretary has the discretion not to bring a case under Title IV of the LMRDA where she finds that violations by opposing candidates are "similar" and thus "did not have a net effect" on the election outcome. *Id.* at 17-18 (citing *Bernsen v. U.S. Dep't of Labor,* 979 F. Supp 32, 37, 39 (D. D.C. 1997); *Shelley v. Brock,* 793 F.2d 1368, 1377 (D.C. Cir. 1986)). This argument is unavailing for several reasons.

First, Defendant's argument ignores the narrow circumstances under which the Secretary exercises this discretion: The exception only applies to the "effect" of a "similar violation" that can be quantified. *See Bernsen,* 979 F. Supp at 36-37 (both candidates used union resources to mail campaign material to all members). In this case, Defendant submitted declarations which describe the placement of USA campaign stickers on employer property and other allegedly improper campaigning. Defendant's general allegations regarding improper campaigning in no way provide the kind of specific, tailored claim that the Secretary might use to offset the effect of the unrebutted evidence that employer resources were used to coordinate, disseminate, and create campaign material for the incumbent slate.

Second, the fact that the Secretary can, in unusual circumstances, exercise her prosecutorial discretion and decline to bring an action on this ground does not imply that such a defense is generally available to a defendant who has violated the Act. If Defendant's allegations are true and the USA slate committed extensive violations, the validity of the election is likely to be more tainted by violations of the Act, rather than unaffected by those violations.

Finally, even if Defendant's allegations of misuse of employer resources by the USA slate are to be considered, none of the allegations is sufficiently substantiated. For example, Defendant alleges that the USA slate used the employer's telephones and provided as evidence lists of telephone calls made from various employer telephones. *See* Paper No. 31, Exh. 14 at 1. However, the telephone records do not identify the caller or the content of the conversation. One declarant reported a telephone conversation in which three USA members allegedly discussed "where each would go to campaign." *Id.*, Exh. 3. However, no evidence was produced to establish whether any of the participants actually campaigned pursuant to the call, or how many members were affected by any such campaigning. Accordingly, no effect on outcome was alleged. Two declarants reported a telephone call and email allegedly soliciting them personally for USA positions. *See id.*, Exhs. 7-8. Such actions would have affected, at most, only those two members, neither of whom appears to have been swayed to either vote for or join the USA slate. With respect to an alleged use of employer golf carts while working for the employer (*see id.* at 11-13), Defendant has not shown that any distribution of campaign flyers or discussion of the election was not incidental to legitimate employer business. *See* 29 C.F.R. § 452.76 (campaigning incidental to regular employer or union business is not a violation of section 401(g)). Likewise, Defendant fails to prove that the alleged use of the employer copier by Jeff Exum (*see* Paper No. 31, Exh. 8) had an effect on the outcome of the election because Defendant has failed to produce specific information, such as the number of copies reproduced or the number of members that work in the Continuous Caster Electrical Shop where Goodman states he saw the USA slate flyer posted. *See id.* at 16.

In sum, Defendant's unsubstantiated allegations of violations by the opposition slate are insufficient to offset its own election violations, the evidence of which is substantial and unrefuted. Accordingly, Plaintiff is entitled to summary judgment in this case.

III. CONCLUSION

For the foregoing reasons and those set forth in her Motion for Summary Judgment, the Court should enter summary judgment in Plaintiff's favor and against Defendant.

Respectfully submitted,

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