

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**ABC INDUSTRIAL LAUNDRY LLC, d/b/a
UNIVERSAL LAUNDRIES & LINEN SUPPLY**

and

Case 28-CA-22133

AMERICA ORTIZ VAZQUEZ, an Individual

and

Case 28-CA-22219

MARIA GUADALUPE ROJAS, an Individual

and

Case 28-CA-22286

MARTHA CASTILLO, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

**TO: Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary**

Respectfully submitted,

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I. INTRODUCTION

By its exceptions, ABC Industrial Laundry, LLC d/b/a Universal Laundries & Linen Supply (Respondent) seeks to have the Board ignore the record evidence in this case and the well-reasoned credibility determinations of Administrative Law Judge Burton Litvack (the ALJ) that Respondent discharged its employee America Vazquez (Vazquez) and laid off its employees Maria Guadalupe Rojas (Rojas) and Martha Castillo (Castillo) because it suspected that they were participating in activities on behalf of Culinary Workers Union Local 226, affiliated with UNITE HERE (the Union). Respondent should prevail on its numerous and duplicative exceptions only if the Board chooses to ignore or overrule its established policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Respondent's exceptions are without merit and should be denied.

II. RESPONDENT'S EXCEPTIONS

A. The Clear Preponderance of the Evidence

In its exceptions and brief in support, Respondent urges that its three witnesses – Plant Manager Kobi Levy (K. Levy), his father and Respondent's managing partner Moshe Levy (M. Levi), and supervisor Carmela Cruz Sarabia (Cruz) – “offered consistent and credible evidence.” (RB 9)¹ The ALJ assessed the credibility of the three witnesses on which Respondent relies in its claim and found each wanting. The ALJ

¹ RB___ refers to Respondent's Brief in support of Exceptions followed by page. Transcript references are: (___:___) showing transcript page and line or lines. ALJD ___:___ refers to JD(SF)-33-09 issued by the ALJ on September 28, 2009, followed by page and lines. RX followed by the exhibit number refers to Respondent's exhibit.

found that K. Levy had the “demeanor, while testifying of a disingenuous witness.” (ALJD 12:4-5) The ALJ described M. Levy “as being a generally untrustworthy witness.” (ALJD 12:12-13) As to Cruz, the ALJ observed that her “demeanor was that of a witness testifying in a manner designed to buttress her employer’s legal position.” (ALJD 11:40-41) These credibility determinations were not made in a vacuum but were based on a careful analysis of the testimony of Respondent’s witnesses. As to K. Levy and Cruz, much of the analysis turned on their testimony about a list of employees. As to M. Levy, the analysis largely turned on his testimony about the showing of an anti-Union video.

B. The Alleged Employee List

Respondent claimed to have discharged Vazquez for her alleged theft of a portion of a supposed list of employees posted at the office of Respondent’s facility. According to Respondent, Vazquez provided the list or a portion thereof to the Union, and the Union then utilized the list to contact Respondent’s employees. Respondent made the list and its alleged theft the center of its case and its exceptions.

On the first day of the hearing, Respondent offered as Respondent’s Exhibit 1 what Cruz described as the list. (ALJD 5:18-19) The ALJ carefully considered the testimony of Respondent’s witnesses concerning the list and its existence. As to the list itself (RX 1), the ALJ found the list consisted of six pages listing names from Adelita through Yesenis with redacted telephone numbers and “no apparent pages missing or ripped apart.” (ALJD 5:18-19, 47)

On the second day of the hearing, the ALJ found that Cruz changed her testimony regarding the list. Cruz testified that Respondent’s Exhibit 1 was not the actual list, but

was “how [the list] looked.” (ALJD 5:21-28) Describing the questioning the day before, Cruz testified that Respondent’s attorney “asked me if this is like the paper that was posted on the office.” (ALJD 5:25-27) Contrary to Cruz, the hearing transcript reflects the question put to Cruz on the first day of hearing concerning the list:

Q BY MR. SMITH: Ms. Cruz, I am showing you what has been marked as Respondent Exhibit No. 1, Ms. Cruz. Is that the list to which you referred in your testimony, except that it has the names -- the last names and phone numbers redacted off?

A Yes. (55:9-13)

In an attempt to salvage the testimony of Cruz, Respondent’s attorney claimed that he had described Respondent Exhibit 1 as a “recreation of the list.” Through his own questioning, the ALJ discovered that Respondent Exhibit 1 was not the actual list, a portion of which Vazquez alleged stole:

JUDGE LITVACK: No, no, no. In September -- you testified that that was the list that was posted on the secretary’s wall in early September, the list that -- am I right, Mr. Smith, or am I wrong? This is your exhibit. This was the list that was posted on the secretary’s wall in September, part of which that someone stole, am I right?

MR. SMITH: Yes.

THE WITNESS: He asked me if this is like the paper that was posted on the office. Not exactly.

MR. SMITH: Oh.

THE WITNESS: And I don’t look at the names.

JUDGE LITVACK: Wait, I took it that that was the list?

MR. SMITH: I think there are two lists. You’re talking about a schedule.

JUDGE LITVACK: No, no, I’m -- is that Respondent’s Exhibit 1?

MR. SMITH: That is. That is.

JUDGE LITVACK: Hold on. I thought Respondent’s Exhibit 1 was the list of names that allegedly part of which was stolen by America Vazquez? (211:6-25)

THE WITNESS: I answered a question as this is like the list that you saw in the office.

JUDGE LITVACK: So that is “like” the list?

THE WITNESS: Yes.

JUDGE LITVACK: That is not the list?

THE WITNESS: No. I say yes, because they have the names and the phone numbers.

JUDGE LITVACK: Well, when was that list prepared?

THE WITNESS: I have no idea. I’m not the secretary.

MR. SMITH: This was represented to be a recreation of the list --

JUDGE LITVACK: I don't recall you using the term recreation. (212:1-25)

MR. SMITH: Oh, I did.

JUDGE LITVACK: Mr. Twyman?

MR. TWYMAN: I don't recall recreation. I don't remember that term.

JUDGE LITVACK: You said this was a recreation, Mr. Smith?

MR. SMITH: I most certainly did, Your Honor. I was very careful.

JUDGE LITVACK: I don't recall that. In fact, I have a note in my -- so you're not representing that this was -- you're not representing, Mr. Smith, that this was the list?

MR. SMITH: I am representing only that this was prepared by Mary Lou, who was responsible for that list, as a recreation of the actual list that was posted above her desk, in September, before Vazquez was terminated and before the layoffs.

JUDGE LITVACK: So we don't have in the record the actual list?

MR. SMITH: Absolutely not, and I never represented otherwise and I don't think any testimony has been presented --

JUDGE LITVACK: All right. Well, then I misunderstood. I thought this was the list.

MR. SMITH: No. I wanted to put this in to show what the list looked like and we made it very clear. My question at least was, was this a recreation of the list at that time, and that's what I understand it to be. (213:1-13)

As found by the ALJ, “[a] review of the transcript fails to support the assertions of either Cruz or Respondent’s attorney” that Respondent’s Exhibit 1 was a recreation of the alleged list or that Cruz originally testified that Respondent’s Exhibit 1 was “like” the original list that Vazquez alleged stole. (ALJD 5:48-51) Indeed, a word search of the transcript of the first day of hearing fails to find the words recreation, recreate, or like as used to describe Respondent’s Exhibit 1.

The ALJ did not end his analysis about the list with the testimony of Cruz concerning Respondent’s Exhibit 1. He also examined the location of the alleged list. According to Cruz, Respondent posted the list on the wall behind secretary Mary Lou’s desk in her first floor office, opposite the office door. (ALJD 5:14-15, 46) According to K. Levy, the list was “on the left side wall of the secretary.” (ALJD 5:30) The ALJ also considered Cruz’s testimony that she received a report from employee Carmen Rojas on the use of the alleged list by Union agents who had visited her home while supervisor

Anna Munoz was present (5:37-44, 6:1-9), and the failure of K. Levy to corroborate Cruz's testimony that she passed on this report to him. (ALJD 6:12-13) Considering the importance of this testimony to establish both the existence of the list and the claim that Vazquez stole the list and passed it on to the Union, the ALJ noted that neither Rojas nor Munoz testified at the hearing, and that Respondent offered no explanation for its failure to offer them as witnesses. (6:40-41)

Respondent makes much of the ALJ's conclusion that Cruz contradicted K. Levy "that he was aware of the missing page only because the secretary told him a page of missing." (ALJD 6:44-45) According to its brief in support of exceptions, this is a factual finding "unsupported by the record." (RB 12) What Respondent missed or chose to ignore is the following testimony of Cruz:

THE WITNESS: Then he asked Mary Lou, who was the secretary, he asked Mary Lou if she give the numbers to somebody or the paper or something -- she say, "No, I have it right here on the wall."
JUDGE LITVACK: Oh, and that's when she discovered that a page was missing?
THE WITNESS: Yes. (218:8-14)

Against this background, the ALJ questioned the existence of the list itself:

There is, of course, no corroborating evidence regarding pages of the putative list ripped apart or missing; nor is there any explanation as to why the secretary, Mary Lou, failed to inform Respondent about the asserted missing pages. I again note that Mary Lou failed to testify and that Respondent offered no reason for not calling her as a witness. (ALJD 6:46-49)

Respondent may establish the existence of the list only through the testimony of discredited witnesses. Without credible evidence, including the testimony of secretary Mary Lou, who used and may have re-created the list, an employee, and supervisor both of whom alleged saw the list or a part thereof in the hands of a Union agent, Respondent's concern over stealing confidential information (RB 22) rings hollow.

C. Interrogation of and Discharge of Vasquez

Having carefully considered whether the alleged employee list even existed or was “ripped apart or missing” since the original list was not presented at hearing, it was reasonable for the ALJ to conclude that Respondent used the alleged theft of its list to embark “upon a campaign not to discover who was responsible for stealing a portion of the list of the names and telephone numbers of Respondent’s employees but, rather, to uncover the identities of those employees who were shepherding the union’s inside organizing efforts and to discharge them and to coerce and restrain other employees from engaging in support for union organizing.” (ALJD 12:23-28) The ALJ’s conclusion that Respondent interrogated Vazquez and others including M. Rojas about contacts by the Union is fully supported by the record and should be affirmed by the Board. Similarly, the ALJ’s conclusion that K. Levy threatened Vazquez with discharge and deportation as he questioned her about her Union activities is supported by the ALJ’s well-reasoned credibility determinations that he believed Vazquez and did not believe K. Levy and Cruz.

The ALJ’s conclusion that Respondent discharged Vazquez for her Union activities and not for the alleged theft of the list is reasonable and supported by the record here and should be affirmed by the Board. Respondent’s attempt in its exceptions and brief in support of exceptions to make this a case of misconduct is unsupported by the record. Based on the ALJ’s findings described above and the portions of the transcript cited, the ALJ was corrected when he wrote that he was “unable to conclude either that such a list was ever posted in [the] office or that a portion of the list was ever stolen.” (ALJD 17:45-46)

D. Showing of the Anti-Union Video

The ALJ credited the testimony of Castillo that on or about September 27, 2008, before her layoff, Respondent introduced a representative who showed a 20-minute video about the Union. Following the showing, the representative said it was not a good thing for employees to be in the Union. (95:19-25, 96:1-25, 97:1-18) Respondent also made M. Rojas attend this video showing. (ALJD 19:23-24) Respondent claims that the ALJ's conclusion that the video portrayed the Union in a "dissentient manner" is unsupported by the record. (RB 13) Against the background of unlawful questioning and threatening of employees including the threat that it would be futile to select the Union to represent them made by M. Levy following the showing of the video, it was reasonable for the ALJ to conclude that this was an anti-Union video.

Respondent never produced the video and never explained how it came to be shown to employees. The ALJ described M. Levy's testimony about the showing of the video as "strange" (12:15) and "bizarre." (19:37) A portion of his testimony follows:

Q Okay. Now we've heard testimony about a meeting in that executive office suite, where someone showed a video about a Union?

A I don't know what happened. After three weeks, maybe later, somebody approached to me and he said that there is a trial against us about meetings, activities and all that. I didn't understand him. He said, "We want to talk to the girls here to explain to them what it means." I didn't know where they were coming from. I am not -- this is the first time doing business in the U.S. Most of the business I had was in Israel and in Europe, so I said, "Okay, if you want to talk to them about Union or whatever, non-Union or whatever, talk." When I realized what is going to -- I left the place and I sat in my room, showed the video, then he called me back and he said that he wanted to come back. I said, "Please, I don't want that any more, and if you want anything, talk to my attorney, and if it's okay, do it." I didn't know the procedure and what's going on with that, and I didn't want to get involved with that. Maybe it's a mistake or maybe not, but (177:7-25) they came to us and I didn't know at the beginning either from the Union or anti, and against Union, whatever. Whatever they did was a meeting for one hour. They explained, they showed them a video which was in Spanish and I didn't understand. So I went to my office. After that he said we can come

and do that and bring more people. I said, “Please don’t do that any more.” I don’t have the time for that and I don’t want to get involved with that. Anything you want, talk to my attorney.” (178:1-8)

Moreover, M. Levy placed the showing of this video in October, after the layoffs of M. Rojas and Castillo, although Castillo testified to viewing the video before she was laid off. The ALJ found that M. Levy’s “insistence” that the video was shown in October after the September layoffs “was not worthy of belief.” (ALJD 12:16-17)

E. Layoffs of M. Rojas and Castillo

The ALJ found that Respondent laid off M. Rojas and Castillo at the end of September because of their known or suspected Union activities. As to M. Rojas, the ALJ found that she attended several Union meetings prior to her layoff. (ALJD 18:36-38) He also found that Respondent suspected that she was engaged in Union activities or was a Union supporter, based on K. Levy’s interrogation of her in which she admitted contact with Union agents and the demand by Cruz that she submit a written report of Union activities at Respondent. (ALJD 18:39-44) As Respondent points out in its brief, the ALJ accepted Respondent’s economic defense as supporting a layoff of employees. (ALJD 19:9-12; RB 24) However, Respondent fails to address or answer the ALJ’s finding that M. Levy selected M. Rojas “because he knew or suspected her support for the on-going union organizing [campaign].” (ALJD 19:26-28)

As to the layoff of Castillo, Respondent makes much in its brief in support of exceptions that Castillo engaged in no Union or protected concerted activities, and that Respondent was not aware of any Union or protected concerted activities by her. (RB 23-28) What Respondent fails to address in its exceptions and brief or chooses to ignore is the ALJ’s finding that it “believed or suspected she was a union adherent.” (ALJD 19:39-

40) When an employer discharges an employee based on the mistaken belief that the employee has engaged in union activities, such a discharge violates the Act. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 589-590 (1941) (11-year employee discharged without warning by supervisor who mistakenly believed he was an organizer and instigator for a union).

F. Failure to Recall M. Rojas and Castillo

In its exceptions and brief in support of exceptions, Respondent complains that it lacked notice that the General Counsel would seek a recall remedy for M. Rojas and Castillo. (RB 28-29) Such a claim ignores the record in this proceeding. The Second Consolidated Complaint in this proceeding alleges, at paragraph 6, that Respondent discharged M. Rojas and Castillo. Whether Respondent's actions regarding these two employees are termed discharges or layoffs without recall, it is a distinction without a difference. Respondent's pre-hearing motions to the Board and to the ALJ to enforce pre-hearing settlement agreements disclose that Respondent offered reinstatement to M. Rojas and Castillo in an informal Board settlement agreement. If Respondent failed to fully litigate the reinstatement or recall remedy, it was not because Respondent lacked notice of this remedy.

G. Striking the Testimony of M. Levy

Notwithstanding the ALJ's statement on the record that he was striking the testimony of M. Levy, his testimony is contained in the transcripts of the hearing. The ALJ considered his testimony in his decision as he discredited him (ALJD 12:11-13), although he noted at footnote 20 in the decision that M. Levy failed to corroborate the testimony of his son because portions of his testimony was stricken for violating the

ALJ's sequestration order. (ALJD 8:41-43) The ALJ was correct in striking portions of M. Levy's testimony, especially in the face of the admission of Respondent's attorney that he understood the rule and had no excuse "other than I was not paying attention to that." (187:21-24) Respondent argues in its brief in support of exceptions that the Board should not strike the testimony but scrutinize it closely, mindful of the violation of the rule in determining credibility. (RB 30) The problem with this plea is that Respondent seeks to restore testimony from a witness totally discredited by the ALJ. Respondent's complaint in its exceptions and brief in support of exceptions that the ALJ committed error is without basis. (RB 29-31) The testimony of M. Levy was duly considered and rejected by the ALJ as he found M. Levy to be an incredible witness.

III. CONCLUSION

Respondent's exceptions are without merit and should be denied by the Board. The Board should affirm the ALJ's decision, including the remedy of reinstatement for Vazquez, M. Rojas and Castillo.

Dated at Las Vegas, Nevada, this 20th day of November 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** in Cases 28-CA-22133, et al., was served via E-Gov, E-Filing and facsimile on this 20th day of November 2009, on the following:

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