

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

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Mayra L. Sagastume	:	
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Charging Party,	:	
	:	
- and -	:	Case No. 5-CA-36362
	:	
	:	
Coastal Sunbelt Produce, Inc.	:	
	:	
Respondent.	:	
	x	

**RESPONDENT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS
EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF
THE ADMINISTRATIVE LAW JUDGE**

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Dated: June 8, 2012

Coastal Sunbelt Produce, Inc. (“CSP” or the “Respondent”), by its attorneys, Epstein Becker & Green, P.C., submits this Reply Brief in response to the Counsel for the Acting General Counsel’s (“GC”) Answering Brief.

I. LEGAL ARGUMENT

A. CSP Did Not Violate Section 8(a)(1) by Interrogating Sagastume.

In her Answering Brief, the GC has offered little support that Ramos coercively interrogated Sagastume on the 16th or 17th of November 2010. Absent Sagastume’s self-serving testimony about an interrogation (for which she is unable to recall the date thereof), the GC presented no other evidence of an interrogation. Undoubtedly, this is because Ramos never spoke to Sagastume about her or Hernandez’s Union support. (Tr. 959:6-10)

Assuming, *arguendo*, the veracity of Sagastume’s testimony, the GC falsely accepts that any conversation between a supervisor and employee during an organizing campaign is an unlawful interrogation. In fact, it is well-settled that an interrogation is not an unfair labor practice unless it meets certain severe standards. *See Excavation-Constr., Inc. v. NLRB*, 660 F.2d 1015, 1022 (4th Cir. 1981). These standards are: (a) background of employer hostility and discrimination; (b) the nature of the information sought; (c) the identity of the questioner; and (d) the place and method of interrogation. *Id.*

A review of the evidence provides that these four standards are absent in this case. Specifically, the alleged interrogation is not an unfair labor practice because: (a) CSP has no history of hostility to unions or discrimination;¹ (b) Ramos’ questions garnered general information, not specific details like how certain drivers were voting; (c) Ramos is a low-level manager; and (d) the alleged interrogation occurred in an open office space on the production

¹ Teamsters Local 639 (the “Union”) neither filed any objections to the election that took place on December 17, 2010, nor filed any unfair labor practice charges against CSP on the basis of coercive or other unlawful conduct during the Union’s campaign. (Tr. 87:4-15; 218:6-219:4).

floor, not in an environment of “unnatural formality.” See *Excavation-Constr., Inc.*, 660 F.2d at 1022; see also *Toma Metals, Inc.*, 342 NLRB No. 78 (2004) (finding that a low-level supervisor’s question of “what’s up with the rumor of the union I’m hearing?” was lawful).

Further, based on Sagastume’s own testimony and the General Counsel’s own admission, Ramos and Sagastume casually conversed as friends. (GCB 27, n.85) Ramos did not have a one-sided conversation with Sagastume where he peppered her with coercive questions, threatened plant closure or retaliation, or created an impression of surveillance. At most, Ramos lawfully offered opinions and facts about the Union, and Sagastume reciprocated with her own opinions. See 29 U.S.C. § 160(c). Sagastume’s willing engagement in a back-and-forth dialogue with Ramos proves that the conversation was neither coercive nor inspired fear. See *Rossmore House*, 269 NLRB 1176, 1177 (1984) (“Because production supervisors and employees often work closely together, one can expect that during . . . the workday they will discuss a range of subjects . . . including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace.”).

In sum, because the alleged interrogation occurred in an atmosphere free of coercive conduct, the GC’s claim that Ramos interrogated Sagastume regarding her and Hernandez’s Union activities is without merit. Thus, the Board should vacate the ALJ’s decision.

B. CSP Did Not Violate Section 8(a)(3) by Eliminating Sagastume’s Position.

The GC’s attempt to justify the ALJ’s conclusion that CSP discriminatorily discharged Sagastume because of Hernandez’s protected activity is grossly mistaken. As set forth below, the record is void of substantial evidence supporting the GC’s *prima facie* and pretext burdens. See *Wright Line*, 251 NLRB 1083 (1980); *enf’d* 662 F.2d 889 (1st Cir. 1981).

1. CSP Had No Knowledge of Hernandez's Protected Activity before Deciding to Eliminate Sagastume's Position.

The record is undisputed that Foca alone decided to eliminate Sagastume's position in late October/early November. (Tr. 564:16-24; 568:15-18) Thus, only Foca's knowledge of Hernandez's alleged protected activity between October 15, 2010² and prior to November 5, 2010³ is relevant. *See Gruma Corp.*, 350 NLRB 336 (2007) (finding no knowledge where the manager knew nothing of protected activities when he decided to discharge the employee). Nevertheless, to bolster her *prima facie* case and to justify the ALJ's erroneous findings, the GC relies on facts regarding CSP's alleged knowledge of Hernandez's protected activity that occurred outside this relevant period.⁴ Specifically, the GC muddles the record by alluding to: (a) rumors of an alleged work stoppage around Labor Day 2010; (b) McWhorter's alleged interrogation of Hernandez at the end of November 2010; (c) Foca's sharing of union materials to a local religious leader on December 12, 2010; and (d) the alleged sabotage of Hernandez's delivery load on December 16, 2010. (GCB 12-13, 21, 25-26) Each of these alleged events occurred *well before* CSP knew of union organizing, or *well after* Sagastume's discharge.

Notably, the GC's claim that the ALJ properly inferred CSP's knowledge is contradicted by the inescapable fact that Hernandez affirmatively and convincingly disavowed his Union support to Foca and Corso on November 2, 2010. (Tr. 156:4-7; 206:2-10; 288:7-11; 914:12-14).⁵ Hernandez's voluntary declaration against the Union is the most definitive fact in the record during the relevant period, and thus, shatters the ALJ's finding of knowledge.

² On or about October 15, 2010 CSP received the Union's demand for recognition. (Tr. 835:10-18) (GC Ex. 3)

³ By November 5, 2010, Foca had made the decision to eliminate Sagastume's position as part of the transfer of the Department. (Tr. 537:17-539:15)

⁴ The GC compounds her mistaken reliance on extraneous facts by attempting to attach knowledge to CSP through information acquired about Vargas' protected activities prior to Sagastume's discharge. (GCB 23, 25) CSP's knowledge of Vargas' union activities, however, is immaterial to Sagastume's discharge.

⁵ Not until mid-December 2010 did CSP actually learn that Hernandez supported the Union. (Tr. 932:3-933:9)

Additionally, to cobble support that CSP had prior knowledge of Hernandez's Union activity, the GC blithely mischaracterizes the Human Resources department's ("HR") investigation of Sagastume, Hernandez, and Vargas's complaints against Nixon for his claim that they supported the Union. (GCB 21-24) Contrary to the GC's characterization, HR focused its investigation on Nixon's vulgar language and comments about Sagastume, Hernandez, and Vargas, and not on the drivers' organizing efforts, the Union's campaign, or the validity of Nixon's comments. Also, the record lacks any proof that Corso was updated on HR's investigation and that he received Nixon's statement, which accused *Vargas*—not Hernandez—of Union organizing. (GC Ex. 43) Corso's e-mail to Moore on November 15, 2010, is insufficient to show that Moore responded, and had Moore responded, CSP would have produced such documentation pursuant to the GC's subpoena. (GC 37)

Finally, the GC continues to assert that CSP had knowledge because Sagastume allegedly saw Ramos descend the stairs from the second floor (where management offices are located) after her alleged interrogation. (Tr. 385:14-15; 386:9-10) At best, this assertion is offensive speculation. It is a far reach to infer that descending a stairway means Ramos met with management to discuss Sagastume and Hernandez. The GC is obligated to base her argument on substantial evidence, but Sagastume's self-serving testimony regarding Ramos in a stairwell is insufficient to infer reasonably that Ramos discussed union activities with managers.

The GC compounds this error by suggesting that CSP decided to discharge Sagastume because of the information Ramos allegedly reported. In doing so, the GC points to Foca's e-mail to Corso on November 17, 2010. (R. 10) This e-mail, however, is nothing more than Foca memorializing his decision to transfer the Tomato Department ("Department") that was made

several weeks earlier.⁶ Because the GC's inferences of knowledge are entirely speculative and unsupported by substantial evidence in the record, her arguments should be disregarded.

2. CSP Bore No Anti-Union Animus.

The GC's reasoning that CSP harbored anti-union animus is meritless for several reasons. First, to prove animus, the GC points to Corso's solicitation of grievances, vacation policy improvements, suspended bonus deductions, and promises of pay changes. The GC misses, however, the timing of Corso's actions. Specifically, in September 2010, *before* any knowledge of Union organizing, Corso led focus group meetings with the drivers to ascertain their concerns. (Tr. 929:12-13) Consequently, in early October, *before* any knowledge of organizing, Corso improved the vacation policy and suspended bonus deductions, and hired the Hay Group to analyze the drivers' pay.⁷ When Corso first learned of the organizing on October 15, 2010, Board law barred him from pursuing additional changes to the drivers' terms and conditions of employment. (Tr. 835:10-18); *see Guard Publ'g Co.*, 344 NLRB No. 150 (2005) (presuming an employer's improper motive and interference with employee Section 7 rights where it granted wage increases after learning about an organizing campaign). Before October 15, 2010, CSP was well within its rights to address and improve the drivers' work conditions. *See Fresh Organics, Inc.*, 350 NLRB 309 (2007) (finding no violation where the employer decided to institute an award program before notice of an organizing campaign).

Second, the GC trumpets Corso's speeches to prove animus. Yet, the alleged speeches occurred in November 2010, after Foca decided to eliminate Sagastume's position and more than

⁶ The GC questions Foca's email to Corso, stating that he could have waited until an optional managerial meeting the next day to inform upper-level managers of the transfer. (GCB 28, n. 89) But, Foca did not send the email to any manager who regularly attends this meeting, and Foca and Corso are not always present at them. (Tr. 747:3-23)

⁷ The GC grossly misstates that Corso "admitted to telling drivers that no pay increases would occur until after the union campaign was over" to bolster her argument of animus. (GCB 16) The GC conveniently leaves out Corso's immediate clarification that: "The moment I received the letter from the Teamsters, all the things I had been working on, based on feedback I got from focus groups . . . came to a screeching halt there or abouts on that day. . . [because] any adjustments could be construed as me trying to garner their favor." (Tr. 833:8-834:7)

one month before the Union election. *See Peerless Plywood Co.*, 107 NLRB 427 (1953) (holding that captive audience speeches are lawful if they do not occur within 24 hours of an election). The GC further asserts, based on unreliable testimony, that Corso allegedly threatened plant closure and created an impression of surveillance. The GC ignores, however, that Corso hired a former NLRB agent to train CSP's executives and managers on lawful communications with employees about the Union's campaign. (Tr. 845: 9-10; 903:19-25) In this training, Corso learned, *inter alia*, not to threaten, promise, interrogate or spy on employees. (Tr. 902:17-24) (R. Ex. 22) It defies logic that Corso would blatantly ignore and act oppositely from his training.

Third, the GC points to the alleged sabotage of Hernandez's truck on December 16, 2010, as evidence of animus. (GCB 25-26) Not only did this incident occur well after Sagastume's position was eliminated, but no evidence exists indicating that CSP was to blame.⁸ It is irrational that CSP would deliberately damage its own products, jeopardize its customer relationships, and harm its reputation for the purpose of discouraging organizing. *See Landis Morgan Transp.*, 177 NLRB 579, 584 (1969) (presuming that "an employer who is making a living through the use of expensive equipment does not sabotage it...to taint a union's cause in a Board election").

Accordingly, because the GC failed to prove that CSP discriminatorily discharged Sagastume because of Hernandez's Union activity, CSP requests reversal of the ALJ's decision.

3. The GC Fails to Prove, By a Preponderance of the Evidence, that CSP's Legitimate Business Reasons for Discharging Sagastume Were Pretextual.

Although the record is clear that Foca's decision to eliminate Sagastume's position was purely business driven⁹ and would have occurred irrespective of Hernandez's protected activity,

⁸ At the Hearing, the ALJ stated, "It could have been an employee that did it. We don't know who did that with the truck." (Tr. 296:23-24).

⁹ Sagastume's position was eliminated as part of a broader restructuring of the Tomato Department that was needed to service a sizeable new tomato business for Giant Foods. (Tr. 501:15; 897:13) The Giant business was expected to increase the workload of the Tomato Department significantly in terms of volume and precise quality specifications. (Tr. 428:2-4; 523:8-25; 950:21-951:8)

the GC argues that CSP's legitimate business reasons were pretextual. (GC 46-49) (Tr. 574:8-21; 732:15-21) *See Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 523 (stating to prove pretext the General Counsel must prove, by a preponderance of the evidence, that "union antipathy" played an actual role in the decision to discharge employees). The GC bases her arguments, however, on the same flawed logic as the ALJ, especially with respect to: (a) the timing of the Department's transfer; (b) the nature of transfer; and (c) the role of her position after the transfer.

(a) The Timing of the Department's Transfer Was Not Suspect.

The GC ignores that Foca began high-level conversations with CSP executives about transferring the Department in July 2010, well before knowledge of employees' discontent. (Tr. 530:13-531:7) (R. Ex. 7) The GC further overlooks that Foca and Moore decided to transfer the Department in September 2010, well before any knowledge of the Union campaign. (Tr. 502:2-19; 531:13-533:10; 797:11-17) This evidence, therefore, destroys any reasonable inference that CSP deliberately transferred the Department to interfere with drivers' protected activities.

Additionally, the GC argues that CSP offered "no good reason" for transferring the Department on Thursday, November 18, 2010. (GCB 29) The GC's assertion, however, lacks merit for several reasons. First, the GC overlooks that Foca accelerated the transfer due to Giant's dissatisfaction with the first tomato shipment on October 14, 2010. (Tr. 548:14-549:22) Thereafter, Foca decided to eliminate Sagastume's position in late October/early November, and Foca and Zeleznik began the final operational preparations to complete the transfer by Thanksgiving. (Tr. 537:17-538:4; 539:5-8)

Second, the GC misrepresents Foca's testimony when she states that "the transfer was made on Thursday, [November 18, 2010] because of his travel schedule." (GCB 29) A careful review of the record reveals that Foca testified that his travel schedule delayed the transfer until

after the week of Monday, November 8, 2010, and operational business matters caused the gap between Monday, November 15th and Thursday, November 18th. (Tr. 562:4-16)

Third, the GC argues that replacing Sagastume prior to Thanksgiving, one of CSP and ECFC's busiest periods, was unreasonable. (GCB 49) In doing so, the GC misses that managing a single spreadsheet was not crucial to ECFC's business success at that time. Rather, supplying tomatoes to meet Giant's exact quality specifications and to nurture its relationship with Giant was ECFC's top priority. It was critical that ECFC meet its number one customer's product specification reservations before the busiest time of the year. (Tr. 897:13)

(b) The Tomato Department's Transfer Was Not Nominal.

The GC baselessly argues that the Department's transfer was nominal. (GCB 30) Yet, the GC selectively ignores the significant operational changes ECFC implemented and narrowly focuses on minor administrative functions that remained constant. (GCB 30) It is unreasonable to claim the transfer was nominal where the record undisputedly shows the Department underwent the following changes: (1) creation of three separate value streams that fit within ECFC's structure (Tr. 533:4); (2) implementation of ECFC's unique quality assurance practices, which was vital to sourcing the Giant account (Tr. 486:1-7); (3) promotion of three employees to manage the new value streams (Tr. 555:20-21); (4) implementation of ECFC's pay scale (Tr. 557:9-558:6; 723:10-724:2); (5) promotion of Perdomo and A. Hernandez to salaried Assistant Managers (Tr. 633:1-634:4; 724:3-725:1) (GC Exs. 50 & 51); and (6) elimination of the repack administration position. (R. Ex. 10) It is irrational that CSP would devote such significant time, expense, and manpower to transfer the Department simply to discharge Sagastume.

(c) Sagastume's Position Was Eliminated for Efficiency Reasons.

CSP has submitted ample evidence to demonstrate that Foca made a sound business decision to discharge Sagastume because her position was redundant, expensive, and

unnecessary. (Tr. 494:12-496:20; 727:11-17; 728:2-10; 731:15-20). Although Foca would have made this decision irrespective of Hernandez's Union activity, the GC baselessly second-guesses Foca's business judgment. *See Redwood Empire, Inc.*, 296 NLRB 369, 392 (1989) (noting triers of fact may not substitute their business judgment for that of the employer).

(i) *ECFC's Existing Personnel Could Easily Assume Sagastume's Job Duties.*

Contrary to the ALJ, the record demonstrates that Foca and Zeleznik determined that existing personnel could easily absorb Sagastume's work as an administrator. (Tr. 494:15-24; 692:23-693:18; 727:11-17; 728:2-10) Sagastume's work was sufficiently simplistic that any one of five ECFC employees could manage the spreadsheet and perform their regular duties contemporaneously. (Tr. 975:14-15; 976:12-15) The fact that ECFC has never hired someone to replace Sagastume further confirms that her duties were duplicative and subsumable. (Tr. 558:8-10) ECFC acted justifiably on "an opportunity to become more efficient" when eliminating Sagastume's position,¹⁰ and the GC fails to explain otherwise. (Tr. 534:16)

(ii) *Sagastume Did Not Possess the Necessary English-Speaking Skills to Integrate into an ECFC's Administrator Role Successfully.*

Had ECFC retained Sagastume, she would have worked as an ECFC administrator and her job duties would have included answering customer calls, inputting customer orders, and acting as "the first line of defense" on customer issues. (Tr. 535:4-13; 627:2-9; 731:15-20) ECFC's customers primarily speak English; yet Sagastume only speaks Spanish and admitted that she could not work in a position that required her to write, read, and speak English. (Tr. 404:22-405:4) Sagastume's inability to speak English is not negated because employees who now perform her work do not field customer calls, because Sagastume, unlike most of those other employees, would have had to work as an ECFC administrator when she was not

¹⁰ CSP has a past practice of eliminating redundant positions during restructurings, further demonstrating that the same decision would have occurred regardless of Hernandez's protected activity. (Tr. 537:3-16)

performing the 15-20 hours of work per week on the spreadsheet. (GCB 47, n. 131) But, she undeniably lacked the requisite skills to work and succeed as an ECFC administrator.¹¹

(iii) Sagastume's High Hourly Rate Rendered Her Too Costly.

The GC erroneously suggests that CSP's cost concerns over Sagastume's hourly rate was pretext because it was inconsistent with pay raises awarded to Perdomo and A. Hernandez after the transfer. (GCB 48) But, at \$21.67 per hour, Sagastume was the highest wage earner in the entire Department, earning significantly more than Perdomo and A. Hernandez. (GC Ex. 41) Indeed, as hourly supervisors, Perdomo earn \$18.35 per hour, and A. Hernandez earned \$15.00 per hour. (GC Ex. 41) As salaried managers, Perdomo earns \$50,000 and A. Hernandez earns \$43,000 per year. (GC Exs. 50 & 51) Although it appears that they received significant pay increases after the transfer, a closer look at the documentary evidence shows otherwise. In fact, Perdomo and A. Hernandez's pay increases cost ECFC approximately \$8,534.29, a trivial amount compared to the savings achieved when discharging Sagastume who grossed \$45,677.06 in 2010.¹² Because Perdomo and A. Hernandez's raises did not offset the significant cost savings ECFC received by discharging Sagastume, the GC's pretext argument utterly fails.

In sum, the GC's failed carry her burden that CSP's legitimate business reasons for discharging Sagastume were pretextual, and thus, the ALJD's decision should be reversed.

II. CONCLUSION

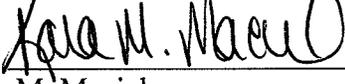
For all the reasons stated herein, Respondent urges the Board to vacate the ALJ's findings of unfair labor practices, vacate the proposed remedy, and dismiss the Complaint.

¹¹ Foca considered offering Sagastume a position with ECFC in lieu of discharge, but, given her \$21.67 per hour wage and low skill set, the only available position was on the tomato or repack lines earning approximately \$8.00 per hour. (Tr. 576:16-577:16; 731:9-14) Thus, it was not a viable option to retain Sagastume as solely a line worker. (Tr. 731:9-14) Additionally, ECFC and CSP have a firm philosophy that transferring an employee to a significantly lower paying position is an unsuccessful business decision (Tr. 576:16-577:16).

¹² Perdomo's gross pay is higher than Sagastume's pay only because Perdomo worked 451.60 overtime hours, whereas Sagastume worked 171.20 overtime hours. (GC Ex. 42)

Respectfully submitted,

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Dated: June 8, 2012

CERTIFICATE OF SERVICE

I, Kara M. Maciel, hereby certify that a copy of the foregoing Reply Brief in Further Support of Its Exceptions to the Decision and Order of the Administrative Law Judge prepared by Respondent was furnished to the following on this 8th day of June 2012:

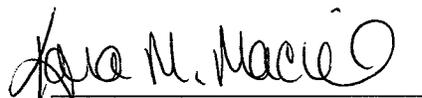
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